DSL

1-2024

Reasonable accommodation beyond disability: an inclusive equality approach through the organisation of the enterprise**

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1. *Introduction. Problem Framing. Methodology*

The question guiding the research addressed in this article is whether it is possible to envisage an extension of the obligation of introducing reasonable accommodation imposed on private employers beyond the factor of disability. The underlying idea that inspired us is to promote the fulfilment of a wider concept of

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** This paper is a modified version of the presentation made by the Authors in the Residential Summer School on International Labour and Business Law, titled «Adaptation of working environment. Workers' health and social diversities» and held by the University of Ferrara and the University of Padua between 11-17 June 2023. Although the paper is the result of a collaborative effort by the Authors, §1, §2, §3 and §7 are to be credited to Riccardo Tonelli; §4 to Massimiliano Rosa; §5 to Ernestyna Pachała-Szymczyk; §6 to Serenay Kara.

Il saggio è stato sottoposto al vaglio del Comitato di Redazione.

inclusive workplaces, where workers' needs are not only taken into consideration but also enhanced.

There are at least two sets of obstacles concerning the extension of the obligation of reasonable accommodations "beyond disability". The first is theoretical: the obligation to provide reasonable accommodations presupposes the implementation of positive actions by the private employer and requires a strong rooting on a normative level[1]. The second is practical and concerns the concrete sustainability of reasonable accommodations. The implementation of adaptation measures intersects with different rights and interests: the right of the workers requesting the adjustment to meet their own needs, the right of the employer not to bear a «disproportionate burden»[2], and the rights of other workers not to suffer limitations in the enjoyment of their rights.

The topic is highly complex. For this reason, we chose to narrow the scope of research to the extension of reasonable accommodations concerning two possible factors of discrimination other than disability: *family responsibilities* and *religion and beliefs*. In scholarly discussions, the topic has already been addressed by examining the European and international framework or by analysing legal systems outside of Europe, particularly the American and the Canadian ones. In this research, we chose to develop a bottom-up legal comparison, and we considered three different legal systems: the Italian, the Polish, and the Turkish. For each legal system, the selected regulations and jurisprudential decisions that seem to suggest an extension of the obligation for reasonable accommodations beyond disability were examined.

We are aware of the inherent risks in conducting comparative labour law analysis[3]. Therefore, given the complexity of the subject and space limitations, we do not aim to provide a definitive solution, nor to conduct an exhaustive analysis of how each provision under consideration has been interpreted and applied. What we aim to do is to point out some suggestions that hopefully can be useful to enrich the doctrinal debate on the possibility (perhaps probability) of future developments.

Adopting this perspective led us to take a further step beyond mere theoretical reflection. Drawing on some of the multiple insights from the reports of scholars who participated in the Summer School, we reflected on the "tools" which can concretely facilitate the extension of the obligation for reasonable accommodations "beyond disability". In this regard, we considered the role of so-

[1] Similarly, see: S. D'ASCOLA, *Il ragionevole adattamento nell'ordinamento comunitario e in quello nazionale. Il dovere di predisporre adeguate misure organizzative quale limite al potere datoriale*, in "Variazioni di Diritto del Lavoro", no. 2/2022, pp. 179-208.

[2] That is the expression used by the European legislator in Article 5 of Directive 2000/78/EC of 27.11.2000, which established a general framework for equal treatment in employment and occupation.

[3] In this regard, reference must be made to the classic: O. KAHN-FREUND, *On Uses and Misuses of Comparative Law*, in "The Modern Law Review", 1974, p. 37.

called organisational models[4] in achieving a balance of the various rights and interests intertwined in the implementation of organisational adjustments.

The article is organised as follows. In the first part (§ 2 and § 3), we will provide brief contextual indications on the definitions relevant to this study and on the normative and jurisprudential framework, both international and supranational. In the second part (§ 4, § 5 and § 6), we will examine the three selected legal systems. In the final part (§ 7), after some brief considerations on the "clues" emerging from the study of national experiences, we will focus on the role of organisational models in providing reasonable accommodations.

2. *Definitions. "Disability", "reasonable accommodations", "religion and beliefs", and "persons with family responsibilities"*

Before analysing the international and supranational framework, as well as the different national experiences, it seems appropriate to provide a brief reconstruction of concepts that appear most relevant for the purposes of this study. These concepts have evolved within a multilevel legal framework characterised by a tangle of sources that is not easy to unravel. Due to space constraints, a comprehensive analysis will not be feasible, and simplifications will be necessary.

At the European level, an obligation to provide reasonable accommodations is explicitly established only in relation to the factor of disability. Therefore, it is useful to first provide some guidance on the definitions of disability and reasonable accommodation.

Regarding the concept of *disability*, both at the international and European level, the prevailing definitional model appears to be the bio-psycho-social approach[5]. According to this model, disability arises from the interaction between

[4] See below: § 7.

[5] On the international level, reference should be made to Article 1, para. 2 of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). This provision defines «persons with disabilities» as «those who have long-term physical, mental, intellectual, or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others». At the European level, there is no explicit definition of "disability" or "person with a disability" in primary law (Articles 10 and 19 of the Treaty on the Functioning of the European Union - TFEU - and Articles 21 and 26 of the Charter of Fundamental Rights of the European Union - CFREU). This absence is also observed in secondary law – Including notably the Directive 2000/78/EC. However, the Court of Justice has been repeatedly called upon to provide an interpretation of this concept to delineate the scope of Directive 2000/78/EC, which constitutes the reference source regarding workplace discrimination at the supranational level. Starting with the landmark judgment in *HK Danmark* (ECJ, C-335/11 and C-337/11, 11.04.2013), the Court of Justice has substantially embraced the bio-psycho-social model of disability, already endorsed in international law by the UNCRPD. In this regard, see also, among others: ECJ, C-363/12, 18.03.2014. It is worth noting that, although not expressly provided for in the Directive, the notion of disability must be uniform and cannot be left to the discretion of the Member States. See: ECJ, C-13/05, *Chacon Navas*, 16.03.2006.

It is also worth noting that in the Italian legal system, the bio-psycho-social definition of disability has been recently included in Article 2, para. 2, lett. a), point 1 of the enabling act no. 227/2021.

individuals with impairments and attitudinal and environmental barriers that impede their complete and effective participation in society on an equal basis with others. To simplify, three essential elements are typically identified: (i) the presence of an impairment, not necessarily a disease; (ii) the interaction with various barriers that may hinder their full and effective participation in society on an equal basis with others; (iii) the prolonged duration of the limitation.

Regarding the concept of *reasonable accommodation*, a primary definition can be found at the international level. Article 2 of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) defines «reasonable accommodations» as «necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise, on an equal basis with others of all human rights and fundamental freedoms». This definition is complemented by EU law, particularly Directive 2000/78/EC, which, in Article 5, refers to «reasonable accommodations» to be provided to disabled workers. It specifies these accommodations as «appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer»[6]. It is worth noting that, as is well known, the UNCRPD is an «integral part of the Union's legal order»[7]. Therefore, EU secondary law, including Directive 2000/78/EC, should be interpreted, to the extent possible, in accordance with the international source[8].

The vagueness of the cited provisions gives rise to multiple interpretative challenges that cannot be fully addressed here. For the purposes of this paper, we will adopt a broad definition of reasonable accommodation[9] and we will confine our analysis to measures applicable within employment relationships with private employers. To this end, we have identified four essential elements that a measure must possess to fall within the concept of reasonable accommodation[10]: (i) it must be a necessary and appropriate modification or adjustment; (ii) it must be necessary in a particular and individualised case; (iii) it must ensure the full enjoyment of

[6] It should be noted that Recital 20 of Directive 2000/78/EC also refers to «appropriate measures» as «effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources».

[7] See the aforementioned: ECJ, C-335/11 and C-337/11, *HK Danmark*, para. 30.

[8] *Ibid.*

[9] See the General Comment of the Committee on the Rights of Persons with Disabilities, 22.05.2014, no. 6, para. 23-25.

[10] The outlined framework presented here, of course, represents a simplification compared to the conceptualization of a much more complex notion. For more detailed analyses of the concept of reasonable accommodation as derived from international law and EU law, as well as for further doctrinal references, see: W. CHIAROMONTE, *L'inclusione sociale dei lavoratori disabili fra diritto dell'Unione europea e orientamenti della Corte di giustizia*, in "Variazioni di Diritto del Lavoro", no. 4/2020, p. 897; R. NUNIN, *Disabilità, lavoro e principi di tutela nell'ordinamento internazionale*, in *id.*, p. 879. For some rulings of the national Courts of the Countries covered by this research on the concept of reasonable accommodation, see for the Italian legal system: Court of Cassation, labour section, 13 March 2021, no. 6497; for the Polish legal system: Supreme Court, I PK 334/16, 7.12.2017; for the Turkish legal system: Constitutional Court, *Sevda Yılmaz*, application no. 2017/37627, 02.03.2023.

rights related to access, job performance, and training on an equal basis; (iv) it must not impose a disproportionate or undue burden on the (private) employer. It is also noteworthy that the right to reasonable accommodations is instrumental to the full exercise of other rights. Therefore, reasonable accommodations must be regarded as *tools* to promote substantive equality.

The other two concepts for which it seems useful to provide essential insights are those of *workers with family responsibilities* and *religion and beliefs*.

The first one does not have well-defined boundaries. For the purposes of this study, we will refer to the broad definition found at the international level under Article 1, para. 1 and 2 of the International Labour Organization (ILO) Convention, 1981, No. 156[11]. This provision broadly defines individuals with family responsibilities as «men and women workers with responsibilities» in relation to their dependent children and/or other members of their immediate family who «clearly need their care or support». These responsibilities restrict their possibilities of preparing for, entering, participating in, or advancing in economic activity.

It is worth noting that the perspective of EU law appears to be partially different. The reference source is Directive 2019/1158, which distinguishes between parents and «carer[s]». The latter is defined as «a worker providing personal care or support to a relative[12], or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason, as defined by each Member State» (Article 3, para. 1, lett. d).

In relation to *religion* and *beliefs*, both international law[13] and EU law[14] encompass broad concepts[15]. We will consider the notions of religion and beliefs as inclusive of both the so-called *internal forum*, i.e., having a particular religious belief or conviction, and the so-called *external forum*, i.e., the public manifestation of religious belief and conscience[16]. A more complex concept to define is the «manifestation of religion or beliefs». In this regard, the case law of the European

[11] Note that in the 2018 report «*Care work and care jobs for the future of decent work*» the ILO uses an even broader definition of «care work» or «care activity». These are understood as the activities and relationships involved in meeting the physical, psychological, and emotional needs of adults and children, the elderly and the young, fragile and able-bodied individuals. These activities are relevant regardless of whether they are performed by workers or non-workers.

[12] In accordance with Article 3, para. 1, lett. e) of the Directive 2019/1158, a «relative» means «a worker's son, daughter, mother, father, spouse or, where such partnerships are recognised by national law, partner in civil partnership».

[13] See Article 9, para. 1 of the European Convention on Human Rights (ECHR) which provides that «everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance». See also, among others: ECtHR, 44774/98, *Sahin v. Turkey,* 10.11.2005.

[14] See: Article 10, para. 1 of the European Charter of Fundamental Rights; ECJ, C-157/15, *Achbita,* 14.03.2017.

[15] The issue of the notions of religion and beliefs is highly complex. For a thorough analysis, see: L. VICKERS, *Religion and Belief Discrimination in Employment – The EU Law*, Report for the European Commission of the Directorate-General for Employment, Social Affairs and Equality Opportunities, 2006, pp. 25-29.

[16] For a more comprehensive examination, see: V. PROTOPAPA, *I casi Achbita e Bougnaoui. Il velo islamico tra divieto di discriminazione, libertà religiosa ed esigenze dell'impresa*, in "Argomenti di diritto del lavoro", 2017, no. 4-5, p. 1069.

Court of Justice and the European Court of Human Rights seems to adopt an evaluative approach of a "subjective" nature. This means recognizing a behaviour as a "manifestation of religion or belief" based on the motivations adduced by the individual claiming to have experienced discrimination on such grounds[17].

3. *Reasonable Accommodations "Beyond Disability" in the International and Supranational Context. Brief notes*

Before delving into national experiences, it seems useful to highlight some "clues" found in the international and European context that suggest possible future developments toward an extension of the obligation of reasonable accommodations.

As for the international level, reference must be made to the ILO Recommendation no. 200/2010 on HIV and AIDS. Paragraph 13 of this document explicitly acknowledges that the necessary reasonable accommodations[18] should be arranged to ensure that individuals with HIV-related illnesses can continue to carry out their work. Furthermore, it states that «measures to redeploy such persons to work reasonably adapted to their abilities, to find other work through training or to facilitate their return to work should be encouraged». As is commonly known, above-mentioned ILO Recommendation is a non-binding instrument. However, it represents an important act of political and interpretative guidance for legislators and judges, both at the national and European levels.

The *Eweida* case of the ECtHR is also noteworthy for the adopted study perspective[19]. In this ruling, the Court asserted, in particular, that the better approach to balance the freedom to manifest one's religion and the right of the employer to impose certain limitations upon the wearing of religious symbols as to implement a policy of neutrality is to seek mediated and proportionate solutions. While the mere possibility of changing the job does not constitute such a solution[20].

At the supranational level[21], the European Court of Justice seems to recognise some obligation on the part of the employer to adopt "reasonable

[17] See, among others: ECtHR, 14307/88, *Kokkinakis v. Greece,* 25.05.1993; ECJ, *Achbita*, cit. The "subjective" approach contrasts with the "objective" approach, which recognizes the "manifestation of belief" only in the presence of religious practices or practices related to belief that are commonly considered expressions of a particular religious community.

[18] Para. 1, lett. g) of the Recommendation defines «reasonable accommodation» as «any modification or adjustment to a job or to the workplace that is reasonably practicable and enables a person living with HIV or AIDS to have access to, or participate or advance in, employment».

[19] ECtHR, 48420/10, 59842/10, 51671/10 and 36516/10, *Eweida and Others v. the United Kingdom*, 27.05.2013.

[20] *Ibid*., para. 83.

[21] Similar to what has been outlined concerning the international level, the survey proposed here makes no claim to exhaustiveness. For a more comprehensive analysis as well as for a categorization of measures that, at the supranational level, appear to impose "accommodation" obligations, see: M. BELL, *Adapting work to the worker: The evolving EU legal framework on accommodating worker diversity*, in "International Journal of Discrimination and the Law", 2018, vol. 18, no. 2-3, pp. 124-143.

solutions" concerning the protection of the factor of religion and beliefs[22]. These "solutions" should not result in an excessive restriction of the workers' right to manifest their religious faith, nor impose a disproportionate burden on the employer itself. However, the Court does not go so far as to assert a true obligation to provide reasonable accommodations[23]. The burden on the employer seems to represent a means to find a solution that is adequate and not disproportionate to the restriction of the various rights and interests at stake[24].

Certain interesting clues can also be found in relation to the protection of persons with family responsibilities. In this regard, the Directive 2019/1158 must be mentioned. Various provisions of this directive prescribe measures for the "adaptation" of the work environment and, in general, of work, to the parenting and family care needs. Furthermore, Principle 9 of the European Social Pillar should be quoted, expressly stating that parents and people with caring responsibilities have the right to suitable leave, flexible working arrangements, and access to care services. However, the European Social Pillar is also a source of soft law, therefore lacking binding effects[25].

Still at the supranational level, it seems important to mention Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work. Article 6, para. 2, lett. d) establishes the general obligation for the employer «[to] adapt the work to the individual, especially as regards the design of workplaces, the choice of work equipment, and the choice of working and production methods». This provision has been used by some scholars as a basis for theories extending the obligation of reasonable accommodations «beyond disability»[26].

Despite the briefly mentioned indications, it is worth noting that, as of today, there is no generalised recognition of a right to reasonable accommodation that actually goes beyond disability in the European context.

However, although not technically falling within the concept of reasonable accommodation, the examples mentioned here effectively constitute forms of «adjustment» of the work environment and the employment relationship to certain specific needs of the worker deserving protection. Accordingly, these solutions can contribute to the realisation of an inclusive work environment.

[22] See: ECJ, *Achbita*, cit., ECJ, C-188/15, *Bougnaoui e ADDH*, 4.03.2017, in "Argomenti di diritto del lavoro", 2017, no. 4-5, p. 1069, commented by PROTOPAPA. For a recent analysis of the cited decisions, see: C. BARNARD, *Headscarves, Tolerance and EU Law:* Achbita, Bougnaoui *and* WABE, in J. ADAMS-PRASSL, A. BOGG, ACL DAVIES (eds.), *Landmark Cases in Labour Law*, Oxford, Hart Publishing, 2022, pp. 323-347.

[23] See: Adv. Gen. Kokott in his opinion on the *Achbita* case, para. 110.

[24] ECJ, *Achbita*, cit., para. 41.

[25] The judgment of the ECJ, C-303/06, *Coleman,* 17.07.2008, is also of particular relevance to the issue addressed here. In this decision, the ECJ recognized the extension of the prohibition of discrimination to parents occupied in caring for a disabled child. However, the judges do not directly assert any obligation to provide accommodations for such caregivers.

[26] See, among others: M. BELL, *Adapting*, cit.; A. ROSIELLO, *La sottile linea di confine tra la violazione della normativa in materia di sicurezza e discriminazione quando si è in presenza di gruppi di lavoratori soggetti a rischi particolari*, in O. BONARDI (ed.), *Eguaglianza e divieti di discriminazione nell'era del diritto del lavoro derogabile*, Rome, Ediesse, 2017, pp. 287-317.

4. *Italy*

4.1. *Introduction*

The objective of this part is to ascertain whether the Italian legal system provides the right to reasonable accommodations for religious beliefs and/or for workers with family responsibilities. Firstly, it seems appropriate to mention the definition of reasonable accommodation at the national level, as interpreted by case law[27].

Article 3, para. 3-*bis*, of Legislative Decree no. 216/2003 provides that «in order to ensure compliance with the principle of equal treatment of persons with disabilities, public and private employers are required to adopt reasonable accommodations, as defined by the United Nations Convention on the Rights of Persons with Disabilities, ratified pursuant to Law no. 18 of March 3, 2009, in the workplace to ensure full equality for persons with disabilities with other workers»[28]. Therefore, the legislator requires the employer to make adjustments that are appropriate in each specific case solely in favour of employees with disabilities, without extending this obligation to other categories.

According to the interpretation of the provision from the Court of Cassation, labour section, 9 March 2021, no. 6497, in "Diritto & Giustizia", 10 March 2021, the obligation imposed on the employer has a variable content that cannot be determined *a priori*. Thus, there is no exhaustive list of reasonable accommodations since the employer is required to adopt a customised approach tailored to the concrete needs that each employee with a disability may present[29].

Moreover, the employer's obligation is not absolute, but encounters limits: (i) the proportionality and non-excessiveness of the adaptation measures; (ii) the reasonableness of the accommodation[30]. According to the Court of Cassation,

[27] This analysis is carried out without any claim to exhaustiveness, but, due to space constraints, provisions and judgments deemed to be relevant to the research objectives have been selected.

[28] Paragraph 3-*bis* of Article 3, of Legislative Decree no. 216/2003 was introduced by Art. 9, para. 4-*ter*, of Law Decree no. 76/2003, converted with amendments by Law no. 99/2013, following the condemnation of Italy by the Court of Justice of the European Union for non-compliance with Directive 2000/78/EC (the judgment of the ECJ, C-312/2011, *European Commission v Italian Republic*, 04.07.2013). For an in-depth discussion of the notion of reasonable accommodations adopted by the Italian legal system, see, among others: D. GAROFALO, *La tutela del lavoratore disabile nel prisma degli accomodamenti ragionevoli,* in "Argomenti di diritto del lavoro", 2019, no. 6, p. 1211.

[29] For instance, reasonable accommodations may involve modifications in the work environment, such as the removal of architectural barriers; the arrangement of premises; the reconfiguration of the workstation; the adaptation of equipment; the use of specific hardware or software.

In addition, reasonable accommodations may include organisational interventions, such as redistribution of tasks; rescheduling or reduction of working hours; change of shifts; use of remote working and other flexible forms of work.

[30] According to the judgment no. 6497/2021, «alongside the express limit of the "disproportionate" cost, there is the adjunct of the adjective qualifying the accommodation as "reasonable". It represents a further limit because it has an independent literal value, given that if

«while it can be argued that any disproportionate cost, understood in its broadest sense as "excessive" in relation to the dimensions and financial resources of the undertaking, renders the adjustment *per se* unreasonable (...) it cannot be excluded that, even in the presence of a sustainable cost, factual circumstances render the organisational change unreasonable, having regard, for example, to the interest of other workers who may be involved»[31].

Having briefly examined the legal concept of reasonable accommodations, it is now possible to ascertain whether, within the Italian legal system, even in the absence of an express provision to that effect, the employer is obliged to accommodate the religious and/or care needs.

4.2. *Religion*

Religion is protected under the Italian Constitution in several respects. Primarily, both positive and negative religious freedoms are guaranteed. Therefore, in a perspective of religious pluralism, the Constitution protects not only the individual's affiliation with any religious denomination, but also the position of atheists, agnostics, or those indifferent to religion. Furthermore, it is safeguarded not only the *forum internum*, but also the *forum externum*, i.e. the right to express one's religious beliefs, individually and collectively, in private and in public[32].

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the only reason for exempting the employer from implementing the adjustment was the "disproportionate" burden, there would have been no need to add the term "reasonable"».

[31] E. TARQUINI, *Gli accomodamenti ex art. 3 co. 3 bis d.lgs. 216/2003: quale ragionevolezza? Nota a Cass. 6497/2021*, in "Italian Equality Network", 20.10.2021, finds that the case law's reconstruction according to which reasonableness would be an autonomous limit with respect to the obligation of reasonable accommodations does not appear to be entirely in line with supranational sources.

In fact, Art. 3, para. 3-*bis*, of Legislative Decree no. 216/2003, transposes the definition of reasonable accommodations from the United Nations Convention on the Rights of Persons with Disabilities, adopted on 13.12.2006, ratified and made enforceable by Italy with the Law no. 18/2009. However, the jurisprudence seems to diverge from the general recommendations provided by the Committee on the Rights of Persons with Disabilities, established by Article 34 of the Convention, with the function of monitoring the implementation of the Convention by the Contracting States and formulating guidelines and recommendations. Indeed, according to the Committee's General Comment no. 6 on equality and non-discrimination, point 25(a), «reasonable accommodation is a single term, and "reasonable" should not be misunderstood as an exception clause; the concept of "reasonableness" should not act as a distinct qualifier or modifier to the duty. It is not a means by which the costs of accommodation or the availability of resources can be assessed — this occurs at a later stage, when the "disproportionate or undue burden" assessment is undertaken. Rather, the reasonableness of an accommodation is a reference to its relevance, appropriateness and effectiveness for the person with a disability. An accommodation is reasonable, therefore, if it achieves the purpose (or purposes) for which it is being made, and is tailored to meet the requirements of the person with a disability». Therefore, according to the interpretation provided by the Committee, reasonableness seems to indicate the appropriateness of the accommodation in relation to the interest of the disabled person and not an autonomous limitation on the employer's obligation.

[32] Among the fundamental norms of the Italian Constitution concerning religion, Article 19 guarantees the right to «freely professing one's own religious faith in any form, individually or collectively, to propagate it and to worship in private or in public, provided that it does not involve rites contrary to public morality». The religious phenomenon is also regulated by Article 7 (concerning the Catholic faith) and Article 8 (concerning agreements between non-Catholic

However, the full exercise of religious freedom presents numerous challenges in the work environment:

(i) Conflicts may arise between respect for the religious precepts of the cult to which one belongs and respect for the legal obligation to perform work. Indeed, observance of the days reserved by the religion for worship and/or rest may clash with the requirement to work on those days. Moreover, some religions (such as Islam) require praying several times during the day. When the practising believer is working, prayers can only be performed under the condition of temporarily interrupting work.

(ii) Conflicts may arise between the values prescribed by one's religion and the object of work performance, such as in the scenario of so-called conscientious objectors who consider some of the tasks covered by their employment contract incompatible with the precepts of their religion.

(iii) Religions may prescribe practices that could lead to additional difficulties in the performance of work. For instance, during the Ramadan, observant employees, by abstaining from eating and drinking from dawn to dusk, may experience reduced psycho-physical energies to perform their work, especially if they are engaged in physically demanding occupations[33]. Similarly, specific dietary requirements of certain religions may not be accommodated in workplace menus, leading some employees to refuse food offerings for religious reasons, thus returning to work inadequately fed.

(iv) Workers of different religions as well as non-believers or non-practising workers increasingly coexist in the workplace. This could lead to conflicts regarding the display in the workplace of religious symbols belonging to a specific denomination with which adherents of other religions or non-believers might not recognize and identify themselves.

(v) Religious considerations might clash with internal policies implemented by employers regarding the regulation of the religious phenomenon. Indeed, some employers adopt religious neutrality policies within the workplace, prohibiting the display of religious symbols for all or certain categories of employees (e.g. those interacting with the public or those required to wear a company uniform). This may affect the freedom to express religious affiliation in the workplace (*forum externum*) by displaying symbols characteristic of the confessional identity, like crucifix necklace for Christians, headscarf worn by Islamic women, or ritual dagger of Sikhs (kirpan)[34].

(vi) On the other hand, the employer could structure his/her activity in adherence to a specific religious belief, as in the case of religious-oriented

denominations and the Italian State) of the Constitution and, in a broader sense, by the principle of equality enshrined in Article 3 of the Constitution, which explicitly refers to religious orientation.

[33] Regarding the occupational safety risks associated with the observance of Ramadan, see the document *Safety at Work and Ramadan* available on the INAIL (National Institute for Insurance against Accidents at Work) website.

[34] Moreover, certain religious symbols also raise broader issues related to public order and security. For instance, some types of the Islamic headscarf may prevent the full identification of the person, while the Sikh kirpan is both a religious symbol and a weapon suitable for offence.

organisations (in Italian "*organizzazioni di tendenza*"), i.e. «non-entrepreneurs employers who carry out non-profit activities ... of religion or worship» (Article 4, Law no. 108/1990). In these cases, the religious freedom of all employees not belonging to that specific religion or cult may be restricted[35].

The analysis conducted shows that there are many situations where employees, in order to fully enjoy religious freedom, may need the employer to adopt reasonable accommodations, adjusting the organisation and/or working conditions to meet the individual needs related to religious affiliation[36]. As observed, however, the Italian legal system does not expressly recognize the employer's obligation to adopt reasonable accommodations based on religion, deferring such choices to the employer's implementation of voluntary *diversity management* policies.

The choice not to impose reasonable accommodations related to religion is probably due to the legislator's intention not to impose on employers - in a labour market increasingly characterised by religious and cultural pluralism - a generalised obligation to adopt customised solutions to respond to each employee's religious needs. In fact, some companies may receive a large number of requests, which, even if in themselves may not entail excessive burdens, could create difficulties in personnel management when considered as a whole. Furthermore, given that the concepts of «reasonable accommodations» and «disproportionate or undue burden» are general clauses, it might not always be evident for the employer whether or not, in a specific case, he/she is obliged to adapt his/her business organisation to meet religious needs. Consequently, imposing such an obligation may increase conflicts within the company and litigations. This, in turn, could induce some employers to prefer to hire - under the same salary and professional conditions - employees supposed to belong to the Catholic faith because they should probably have less need of reasonable accommodations based on religion, since national work and rest days traditionally consider the precepts of the Catholicism as the majority denomination. Instead, the risk of workforce exclusion for individuals with disabilities that could result from the obligation to adopt reasonable accommodations is counterbalanced by the compulsory hiring of employees with disabilities imposed on companies to cover the quota of reserved positions (in Italian "*quota di riserva*"), as established by Article 3, Law no. 68/1999.

Despite the absence of a general obligation regarding reasonable accommodations beyond disability, in Italian law there are some provisions that require adjustments to protect the enjoyment of religious freedom. This study, due to space constraints, focuses on two categories of provisions: (i) regulations

[35] The issues raised by non-entrepreneurs religious-oriented organizations cannot be addressed here. For a more in-depth discussion of the topic, reference is made to V. CANGEMI, *Organizzazioni di tendenza e contratto di lavoro subordinato*, Naples, Edizioni Scientifiche Italiane, 2022.

[36] On the subject of reasonable accommodations and religion, see *ex multis*: F. MARINELLI, L. DOLAZZA, *Accomodamenti ragionevoli e discriminazioni per motivi religiosi sul luogo di lavoro*, in "Giornale di diritto del lavoro e di relazioni industriali", no. 3/2022, pp. 377-404; B.G. BELLO, *Accomodamenti ragionevoli basati sulla religione tra diritto antidiscriminatorio e diversity management*, in "Stato, Chiese e Pluralismo confessionale", no. 12/2020, p. 1.

concerning weekly rest and religious holidays; (ii) the cases of so-called conscientious objection.

4.2.1. *Weekly Rest and Religious Holidays*

Concerning Catholic employees, it is provided that, typically, the employer must grant the weekly rest day on Sunday (Art. 2109, para. 1 of the Civil Code, according to which «the employee has the right to a day of rest each week, normally coinciding with Sunday»). This rule favours compliance with the religious precept requiring Christians to attend Sunday Mass. However, the right to Sunday rest is not absolute, as legislative exceptions and derogations exist (Article 9 of Legislative Decree no. 66/2003).

Moreover, some of the national holidays coincide with Christian-Catholic solemnities, thus facilitating Catholic employees' participation in religious life[37]. On holidays celebrating civil or religious festivities, the employee has a subjective right to abstain from work retaining the right to receive remuneration (Law no. 260/1949). However, this right to abstain from work can be waived, but this can occur -unless otherwise provided for in special laws[38]- only through an individual agreement between the employer and the employee[39] or through collective agreements negotiated by trade union organisations to which the employee has given an explicit mandate[40] (see the Court of Cassation, labour section, 19 October 2016, no. 21209, in "IUS Lavoro" 2016, 21 October and the Court of Cassation, labour section, 8 August 2005, no. 16634, in "Giustizia civile-massimario annotato dalla Cassazione", 2005, 6). If employees work on a public holiday, they are entitled to additional remuneration regulated by Article 5, Law no. 260/1949 and, typically, also by collective bargaining.

For employees belonging to non-Catholic denominations, observance of religious festivities is more difficult, given that, as mentioned, the national calendar aligns with the Catholic tradition. However*, ad hoc* rules exist in some laws regulating mutual relationships between the Italian State and non-Catholic religious confessions adopted on the basis of the agreements foreseen in Article 8 of the

[37] See: Law no. 260/1949; Law no. 90/1954; Law no. 54/1977; Art. 6 of the Agreement between the Italian Republic and the Holy See of 18.02.1984; President of the Republic Decree no. 792/1985; Law no. 336/2000. Collective agreements also often contain regulations on holidays.

[38] See: Law no. 520/1952.

[39] It remains unclear, however, what significance may assume an individual agreement contained in the letter of employment whereby the employee undertakes *pro futuro* to work during holidays at the employer's request. For further insights into this matter, see: V. FERRANTE, *Il diritto a non lavorare nelle festività infrasettimanali*, in "Diritto delle Relazioni Industriali", no. 1/2020, pp. 160-162.

[40] According to the Court of Cassation, labour section, 15.07.2019, no. 18887, in "Bollettino ADAPT", 2020, no. 5, «as collective agreements cannot derogate in a pejorative sense the rights of an individual worker (unless they have an explicit mandate to that effect), the aforementioned agreements cannot provide for the obligation of employees to work on midweek holidays, insofar as they affect the right of workers - which is unavailable to trade unions (Cass. no. 9176 of 1997) - to abstain from work».

Constitution[41]. For instance, under Article 4 of Law no. 101/1989, Jewish employees, upon request, have the right to enjoy as their weekly rest period the sabbatical rest (in Italian "*riposo sabbatico*") that runs from half an hour before sunset on Friday to one hour after sunset on Saturday. However, the right to weekly rest on Saturday is not absolute, but «it is exercised within the framework of work organisation flexibility» and «without prejudice to the indispensable needs of the essential services provided for by the legal system». The hours not worked on Saturday are made up on Sundays or other working days without entitlement to additional compensation. Moreover, Article 5 of Law no. 101/1989 extends the application of the provisions related to the sabbatical rest to certain Jewish religious festivities as well, on the basis of the calendar annually communicated to the Ministry of the Interior and published in the Official Gazette[42].

Similar regulations concerning the recognition of religious holidays are provided for in other laws adopted on the basis of agreements stipulated under Article 8 of the Constitution (see, for example: Article 17 of Law no. 516/1988 for Seventh-day Adventist Christian Church; Article 24 of Law no. 245/2012 for the Buddhist holiday of Vesak; Article 25 of Law no. 246/2012 for the Hindu Dipavali holiday). However, some religions, such as all the denominations of the Islam faith, currently lack an agreement with the Italian State. Non-Catholic religious denominations without an agreement are subject to the dated "law on admitted cults" (Law no. 1159/1929, in Italian "*legge sui culti ammessi*") and its implementing regulation (Royal Decree no. 289/1930), which do not contain provisions dedicated to the enjoyment of religious holidays.

4.2.2. *Conscientious Objections*

Italian law contains provisions concerning the so-called conscientious objection, which allow employees to abstain from performing specific work tasks deemed to conflict with their ethical-religious values. Therefore, through the recognition of conscientious objection, the legislator "adapts" work duties to comply with the ethical-religious demands of the employees. However, this accommodation, particularly concerning conscientious objection related to pregnancy termination, may potentially affect the rights recognised to other individuals by the legal system.

The main hypotheses of conscientious objection recognised by the Italian law are as follows: (i) medical and auxiliary healthcare personnel, by prior

[41] Article 8, para. 3 of the Constitution establishes that relationships between the Italian State and religious denominations other than the Catholic one are regulated «by law, based on agreements with their respective representatives».

Instead, non-Catholic denominations lacking agreements with the Italian State are still subject to the so-called law on admitted cults (Law no. 1159/1929) and its implementing regulation (Royal Decree no. 289/1930).

[42] For the year 2024, see the Ministry of the Interior's communication, *Determination of the Calendar of Jewish Religious Holidays* (in Official Gazette, 06.10.2023, no. 234).

declaration, are exempted from performing procedures and activities specifically and necessarily aimed at the termination of pregnancy, unless, due to the particular circumstances, their personal intervention is indispensable to save the life of a woman in imminent danger (Art. 9 of Law no. 194/1978); (ii) medical and auxiliary healthcare personnel, with a prior declaration, can abstain from performing procedures and activities specifically and necessarily aimed at carrying out medically assisted procreation (Art. 16 of Law no. 40/2004); (iii) doctors, researchers and healthcare personnel can declare their conscientious objection to animal experimentation (Law no. 413/1993); (iv) in the event of the reintroduction of military conscription, substitute civilian service is provided for conscientious objectors (Art. 2097 of Legislative Decree no. 66/2010).

4.2.3. *Case Law*

In case law, the judgment of the Court of Cassation, United Sections, 09.09.2021, no. 24414, in "Guida al diritto", 2021, 36, concerning the display of crucifixes in public school classrooms appears particularly relevant, as it makes textual reference to the notion of «reasonable accommodations» in matters of religion[43]. The case involves a teacher who was subject to a disciplinary suspension for thirty days for having systematically removed, before the start of his classes, the crucifix from the classroom wall, contravening a circular of the school principal that had implemented a request for hanging the crucifix made by the majority of the class assembly. The Court of Cassation found that the circular was unlawful and consequently annulled the disciplinary sanction since the school principal had not sought a reasonable accommodation with the position manifested by the dissenting teacher[44]. This judgment, therefore, appears to expressly impose an obligation on the employer to adopt reasonable accommodations to protect the enjoyment of religious freedom.

At this point, it is necessary to compare the definition of reasonable accommodations provided by Article 3, para. 3 *bis* of Legislative Decree no. 216/2003 with the notion contained in judgment no. 24414/2021. According to the judgment, reasonable accommodation is «an *ad hoc* rule, tailored to the specific case, resulting from a mediatory procedure, capable of taking into account also the

[43] For a commentary on the judgment, see: S. BORELLI, *Le Sezioni Unite sul crocifisso: tra principio di laicità, accomodamenti ragionevoli, sindacato antidiscriminatorio e tanti dubbi*, in "Lavoro Diritti e Europa", 28.12.2021; N. COLAIANNI, *Dal "crocifisso di Stato" al "crocifisso di classe" (nota a margine di Cass., SS. UU., 9 settembre 2021, n. 24414)*, in "Stato, Chiese e pluralismo confessionale", 2021, no. 17, pp. 17-64.

[44] The Court of Cassation suggests three ways of displaying the crucifix that are considered reasonable: (i) the affixing, next to the crucifix, of a symbol or phrase capable of testifying to the fact that it is part of the heritage of society, including secular culture; (ii) the different spatial placement of the crucifix, not behind the teacher; (iii) the momentary moving of the crucifix during the dissenting teacher's lesson hours in ways that are formally and substantially respectful of the symbol's significance for the moral conscience of the students.

position of the dissenting teacher ... the search, together, for a mild, intermediate solution, capable of satisfying the different positions to the extent possible in practice, in which all concede something, each taking a step towards the other». As noted in legal doctrine, the expression used here does not seem to refer to reasonable accommodations in the technical sense, but rather «refers to the private settlement of the opposing claims (*aliquid datum aliquid retentum*) or, in general, to the classic "fair balancing" of opposing interests»[45]. Therefore, reasonable accommodations become the request to the employer to mediate between the parties in order to find, where possible, an appropriate solution, as widely accepted as possible, that respects the different religious sensitivities. In this way, however, «a remedy configured to guarantee the effective protection of a substantive right (the right not to suffer discrimination) is thus transformed into a mere procedural obligation»[46].

Although, upon careful consideration, the judgment does not appear to deal with reasonable accommodations in the technical sense, it is believed that it still holds some relevance for this contribution as it appears to require the employer to attempt to find *ad hoc* solutions to accommodate the diverse religious needs present in the workplace.

4.3. *Workers with Family Responsibilities*

4.3.1. *Legislation*

Although an obligation to adopt reasonable accommodations for persons with family responsibilities is not expressly recognised, in Italian law there are provisions requiring for "adjustments" aimed at facilitating employees in fulfilling their family care duties. Recently, Legislative Decree no. 105/2022, implementing the Directive EU 2019/1158, has expanded the rights granted to persons with family responsibilities, pursuing two main objectives: (i) facilitating the work-life balance; (ii) encouraging fair distribution and sharing of care responsibilities in the family between men and women with a view to achieving gender equality in the work and family sphere.

Below, some of the main protections granted by Italian law to workers with family responsibilities will be reported, focusing on the novelties introduced by Legislative Decree no. 105/2022 (so-called Equilibrium Decree)[47].

[45] N. COLAIANNI, *Dal "crocifisso di Stato"*, cit., p. 21.

[46] S. BORELLI, *Le Sezioni*, cit., p. 11.

[47] Due to space constraints, the *focus* has been placed on the main measures aimed at employees caring for persons with disabilities with a particular emphasis on the modifications introduced by Legislative Decree no. 105/2022. In fact, the aim of this section is to highlight the existence of regulations that allow for adjustments of the working conditions of persons with family responsibilities, rather than conducting a complete reconnaissance and analysis of the content of these provisions. For an analysis of the tools that the Italian legal system reserves for parental care needs and the most recent legislative developments in this field, see: U. CARABELLI (ed.), *Riforme*

The first category of provisions relates to hypotheses of work suspensions aimed at enabling the employee to perform family care duties:

1) Paid leave of three days per month (Art. 33, para. 3, of Law no. 104/92): three days of monthly leave, paid by INPS (National Institute for Social Security) and covered by contributions, which can also be used continuously, to care for a severely disabled person who is not hospitalised on a full-time basis.

The Equilibrium Decree introduced two extremely significant innovations: (i) the right to use these leaves has been extended to the partner in a civil union (in Italian "*unione civile*") and to the *de facto* cohabitant (in Italian "*convivente di fatto*"); (ii) the so-called single referent mechanism has been superseded: now, upon request, the right to the leave to assist the same disabled person can be granted to more than one person, subject to the overall limit of three days per month.

2) Biennial extraordinary leave to assist a family member with a certified severe disability who is not hospitalised on a full-time basis (Article 42, para. 5, of Legislative Decree no. 151/2001). After the Equilibrium Decree: (i) the leave has been extended to the partner in a civil union and to the *de facto* cohabitant; (ii) the leave must be granted within thirty (not sixty) days; (iii) cohabitation, when required, can be established after the leave request.

3) Leaves for parents of a child with severe disability (Article 33, para. 2, of Law no. 104/1992): the working mother or, alternatively, the working father of a child with certified severe disability can request their respective employers to take extended parental leave for up to three years (as provided for by Article 33, of Legislative Decree no. 151/2001) or, alternatively, to enjoy two hours of daily paid leave until the child's third birthday.

Other provisions that place limits on the employer's organisational power in order to "accommodate" the needs of caregivers are:

1) The optional exemption from night work (Art. 53 of Law no. 151/2001 and Art. 11 of Legislative Decree no. 66/2003).

2) The right to choose, where possible, the place of work closest to the domicile of the person to be cared for and the prohibition to be transferred without consent (Art. 33, para. 5, of Law no. 104/1992).

3) Priority access to remote working (in Italian "*lavoro agile*") or other forms of flexible work (Art. 33, para. 6-*bis*, of Law no. 104/1992 and Art. 18, para. 3-*bis*, of Law no. 81/2017, both introduced by "Equilibrium Decree"): it is not an absolute right because the request have to be considered and evaluated as a priority only if the employer intends to allow remote working and if the employees' tasks are compatible with remote working, but collective bargaining can turn this priority into a right.

4) Priority in transforming the employment relationship from full-time to part-time (Art. 8 of Legislative Decree no. 81/2015).

parallele e disequilibrio vita-lavoro, in "Rivista giuridica del lavoro e della previdenza sociale", no. 8/2023.

In order to safeguard the effectiveness of the rights recognised to persons with family responsibilities, Article 2-*bis* of Law no. 104/1992, introduced by the "Equilibrium Decree", expressly prohibits discriminating against or treating less favourably: i) those who apply for or take advantage of the benefits provided by art. 33 of Law no. 104/1992 (monthly leave of three days); Art. 33 of Legislative Decree no. 151/2001 (parental leaves in the event of a child's severe disability); Art. 42 of Legislative Decree no. 151/2001 (biennial extraordinary leave); Art. 18 of Legislative Decree no. 81/2017 (priority in remote working); Art. 8 of Legislative Decree no. 81/2015 (priority in the transformation of the relationship into part-time); ii) those who apply for or take advantage of any other benefit granted to employees in relation to the disability condition of those for whom they provide care and assistance.

Furthermore, pursuant to Article 33, para. 7-*ter*, of Law no. 104/1992, introduced by the "Equilibrium Decree", the refusal, opposition or obstruction of the exercise of the rights recognized to caregivers prevents the employer from obtaining the gender equality certification provided for in Article 46-*bis* of Legislative Decree no. 198/2006 (in Italian "*certificazione di parità di genere*") if the violations are detected in the two years preceding the request for certification. Consequently, these companies cannot access benefits associated with the possession of the gender equality certification, such as relief from social security contributions and additional scores in tenders for national and EU funds and for public contracts.

Finally, Article 25, para. 2-*bis*, of Legislative Decree no. 198/2006, as amended by the Law no. 162/2021, broadened the notion of gender discrimination to include discrimination based on family care needs. This provision qualifies as discrimination any treatment or change in the organisation of working conditions and timings that, because of family care needs, can place the employee in at least one of the following conditions: (i) a position of disadvantage compared to other workers; (ii) limitation of opportunities to participate in corporate life or decisions; (iii) limitations to career progression.

4.3.2. *Case Law*

Article 25, para. 2 *bis*, of the so-called Equal Opportunities Code, as amended in 2021, has been applied in judgments that appear significant in order to verify whether, even in the absence of an express provision, the right to reasonable accommodations beyond disability can still be deemed to exist in Italian legal system. As particularly relevant to the objectives of this research, the judgment of the Court of Milan of 17 July 2023, in "Italian Equality Network", 16 November 2023 should be examined[48]. A driver of a Milanese public transport company,

[48] For a commentary on the judgment, see: F. RIZZI, *L'impresa riorganizzata dai divieti di discriminazione (nota a Trib. Milano 17.07.2023),* in "Italian Equality Network", 16.11.2023, pp. 1-7.

father of a child with Asperger's syndrome, complained that the modification of his work shifts placed him at a disadvantage position compared to the other employees due to his family care duties, arguing that his daughter needed a stable family routine for therapeutic reasons (discrimination as parent and caregiver). The judge, upholding the employee's claims, ordered the company to remove the discrimination by adapting the employee's working hours to the specific care needs of his disabled daughter. Therefore, the practical application of Article 25, para. 2-*bis* of Legislative Decree no. 198/2006*,* through the judge's intervention, seems to allow workers with family responsibilities to obtain an adjustment of their working hours tailored to his/her concrete family care needs.

4.4. *Comprehensive Reflections on the Italian Legal Context*

At the legislative level, there are general provisions requiring adjustments in the employer's organisation to promote the protection of religious beliefs and the care duties of workers with family responsibilities. However, these rules do not seem to prescribe reasonable accommodations in the technical sense. In fact, while reasonable accommodations represent *ad hoc* solutions with a variable and non-predefined content aimed at protecting the concrete needs of individual employees, the provisions analysed contain measures with a predetermined content that are uniform for all employees belonging to the same category.

At the jurisprudential level, the Court of Cassation decision no. 24414/2021 seems to express signs of openness towards the proceduralisation of requests for reasonable accommodation based on factors other than disability. Moreover, as seen, there are judgments that, in fact, have ordered the employer to adapt the work schedules of workers with family responsibilities on the basis of their specific care needs.

In conclusion, although, at the current state of the art, it does not seem possible to affirm the existence in the Italian legal system of a generalised obligation of reasonable accommodations beyond disability, there are indications, especially in jurisprudence, that urge companies to find tailored solutions enabling employees to exercise their religious freedom and fulfil their family care responsibilities.

5. *Poland*

5.1. *Religion*

In the Polish legal system, the concept of reasonable accommodation exists in relation to persons with disabilities (Article 23a of the Act of 27.08.1997 on Vocational and social rehabilitation and the employment of disabled persons). In

the same context, it is considered in the doctrine[49] and jurisprudence[50]. While there are some contributions in the literature examining the need and validity of extending the term "reasonable accommodation" to other areas of potential discrimination (like religion)[51], they are scarce. It should be emphasised that, in the current state of the law, there is no general obligation to provide reasonable accommodation to the employee on the basis of religion[52]. Nevertheless, with regard to this issue, two instruments may be noted in Polish law that can be considered manifestations of these adjustments (although not so explicitly named), i.e.: days off for celebrations for members of religious minorities and the so-called conscience clause.

At the very beginning, it should be underlined that Poland is a relatively homogeneous country in terms of religion. According to the Central Statistical Office (GUS), in 2021 in Poland Roman Catholics accounted for 71.3% of the total population (89.77% of those who answered the denomination question). The scale of Catholicism's dominance is shown by the fact that the largest religious minority is Orthodox Christians, who constitute only 0.4% of the total population, followed by Jehovah's Witnesses (0.29%) and members of the Evangelical Augsburg Church (0.17%)[53]. The above data are a testimony to the already mentioned religious homogeneity, which largely determines the content of the legal provisions in this area. By the way, the doctrine also points out that this fact reduces the actual likelihood of discrimination on religious grounds[54].

5.1.1. *Days off for celebrations for members of religious minorities*

It can be seen from the above characteristics of society that public holidays largely coincide with Catholic religious holidays. The general rule in the Labour Code[55] provides that non-working days are Sundays and public holidays (as defined in the regulations on non-working days). In turn, Article 1 of the Act on Public holidays provides that Sundays and thirteen other enumerated days, of which as

[49] See e.g. Ł. PISARCZYK, M. WUJCZYK, in K.W. BARAN, M. GERSDORF, K. RĄCZKA (eds.), *System prawa pracy, Tom III. Indywidualne prawo pracy. Część szczegółowa*, Warsaw, Wolters Kluwer, 2021, pp. 67-70.

[50] See e.g. Supreme Court, I PK 74/14, 12.11.2014; Supreme Court, I PK 334/16, 7.12.2017; Supreme Court, III KRS 49/15, 15.09.2015.

[51] See e.g. M. KUŁAK, *Prawa osób należących do mniejszości wyznaniowych a zakaz dyskryminacji – czy w prawie polskim istnieje obowiązek wprowadzania racjonalnych usprawnień?, Opinia 06/2015*, Polskie Towarzystwo Prawa Antydyskryminacyjnego, in *http://ptpa.org.pl/site/assets/files/publikacje/opinie/Opinia_prawa_osob_nalezacych_do_mniejszosci_wyznaniowych_a_zakaz_dyskryminacji.pdf*.

[52] *Ibid.*, p. 27.

[53] GUS, *Narodowy Spis Powszechny Ludności i Mieszkań 2021*, in *https://stat.gov.pl/spisy-powszechne/nsp-2021/nsp-2021-wyniki-ostateczne/*.

[54] See: M.A. MIELCZAREK, *Zakaz dyskryminacji w zatrudnieniu ze względu na religię i wyznanie*, in J.R. CARBY-HALL, Z. GÓRAL, A. TYC (eds.), *Różne oblicza dyskryminacji w zatrudnieniu*, Warsaw, Wolters Kluwer, 2021, p. 300. Similarly: K. KĘDZIORA, K. ŚMISZEK, *Dyskryminacja i mobbing w zatrudnieniu*, Warsaw, C.H. Beck, 2010, p. 105.

[55] Article 151^9 para. 1 of the Act of 26.06.1974 Labour Code.

many as nine are related to Catholic religion, are public holidays. This situation naturally raises the question of the possibility for members of minority religions to celebrate their holidays in accordance with the freedom of conscience and religion guaranteed by the Constitution[56]. This is enabled by Article 42 of the Act of 17.05.1989 on Guarantees of freedom of conscience and religion, which stipulates that persons belonging to churches and other religious associations whose religious celebrations are not public holidays may, at their own request, be granted exemption from work or study for the time necessary to celebrate in accordance with the requirements of their religion, provided that they work off the time off without being entitled to additional remuneration for work on public holidays or overtime. In accordance with the implementing ordinance[57], such a request shall be notified by the employee to the employer at least 7 days in advance, and the employer shall notify the employee of the conditions for working off at least 3 days prior to the day of leave. Different rules for granting days off apply in the case of religious holidays falling on a specific day of each week. According to para. 1^2 of the said ordinance, in such a situation, to enable the employee to celebrate, the employer shall, at the employee's request, establish an individual working time schedule for the employee.

In addition to the general rule expressed in the aforementioned provision, some laws on the relations between the Polish state and particular religions introduce specific regulations, i.e. indicate religious celebrations when members of a given religious association are entitled to time off work. Such normative acts refer to the general conditions for granting days off work indicated in the Act on Guarantees of freedom of conscience and religion, cited above. These include, i.a.: the Act of 13.05.1994 on the Relationship between the State and the Evangelical-Augsburg Church in the Republic of Poland, Act of 13.05.1994 on the Relationship between the State and the Evangelical-Reformed Church in the Republic of Poland, Act of 20.02.1997 on the Relationship between the State and the Old Catholic Mariavite Church in the Republic of Poland, Act of 30.06.1995 on the Relationship between the State and the Baptist Church in the Republic of Poland, Act of 20.02.1997 on the Relationship between the State and the Jewish religious communities in the Republic of Poland, and others. It should be noted that the Act of 4.07.1991 on the Relationship between the State and the Polish Autocephalous Orthodox Church stands out. In Article 14, it grants adherents of this religion the right to observe religious holidays also according to the Julian calendar and lists seven days on which members of this Church are entitled to time off from work or study without pay, if they are not public holidays. This provision

[56] Article 53 of the Constitution of the Republic of Poland of 2.04.1997.

[57] Para. 1 sec. 1 of the Ordinance of the Ministers for Labour and Social Policy and for National Education of 11.03.1999 on exemptions from work or study for persons belonging to churches and other religious associations in order to celebrate religious holidays which are not public holidays.

means that granting time off work in this case is not conditional on working it off, however, the regulation does not grant pay for these days off either[58].

Against the background of the provisions indicated, several important issues emerge. Firstly, whether the request for time off work is binding for the employer. The doctrine answers this question in the affirmative, (with the caveat, that if the employee fails to comply with the 7-day time limit, it is at the discretion of the employer to grant the exemption[59]). Failure to grant a day off may therefore be regarded not only as a manifestation of discrimination on the part of the employer[60], but also as a violation of the constitutionally guaranteed freedom of conscience and religion[61]. Similarly, in the case of weekly celebrations, upon request, the employer is under obligation to determine the employee's individual working time schedule[62].

Another problematic issue related to the regulation in question is the possibility for the employer to verify the request, i.e. to determine whether the employee is actually a member of the religious association in question. This issue is related to the protection of personal data, as in accordance with Article 9 of the GDPR[63] information relating to religious beliefs is considered a «special category of personal data», the processing of which is - in principle - prohibited. Thus, the literature points out that the employer is not entitled to require a statement from the employee requesting a day off concerning his or her religion or religious affiliation[64], although there are also opinions to the contrary[65]. There are also voices arguing that the employer should have the right to verify whether a particular day is in fact a public holiday for a particular religion, but in many cases this is not difficult due to the laws regulating it for particular religions[66].

[58] See: Z. HAJN, *Prawo pracowników należących do mniejszości wyznaniowych do zwolnień od pracy w celu uprawiania kultu religijnego*, in "Gdańskie Studia Prawnicze", 2007, vol. 17, p. 121; I. KSENICZ, *Zwolnienia od pracy w dni świąteczne Kościołów wschodnich w Polsce*, in "Przegląd Prawa Wyznaniowego", 2021, vol. 13, p. 209; M.A. MIELCZAREK, *Realizacja wolności religijnej w zatrudnieniu pracowniczym*, Warsaw, Difin, 2012, p. 256.

[59] Z. GÓRAL, K. STEFAŃSKI, in Z. GÓRAL (ed.), K. STEFAŃSKI, *Czas pracy*, Warsaw, Wolters Kluwer, 2013, p. 174. Similarly: A. MARTUSZEWICZ, K. PIECYK, *Urlopy pracownicze i inne zwolnienia od pracy*, Warsaw, Wolters Kluwer, 2010, p. 242; I. KSENICZ, *Zwolnienia*, cit., p. 206. A different view is expressed, i.a., by I. Nowak, who indicates that it is only an instructional deadline - see I. NOWAK, *Prawo do zwolnienia od pracy z tytułu świąt religijnych*, in "Humanities and Social Sciences", 2015, vol. XX, 22 (1/2015), p. 128.

[60] M.A. MIELCZAREK, *Realizacja*, cit., p. 251 and the literature referred to therein.

[61] Cf. M. KUŁAK, *Prawa*, cit., p. 1.

[62] Z. GÓRAL, K. STEFAŃSKI, in Z. GÓRAL (ed.), K. STEFAŃSKI, *Czas*, cit., p. 175; A. MARTUSZEWICZ, K. PIECYK, *Urlopy*, cit., p. 240.

[63] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27.04.2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[64] Z. GÓRAL, K. STEFAŃSKI, in Z. GÓRAL (ed.), K. STEFAŃSKI, *Czas*, cit., p. 175; M. KUŁAK, *Prawa*, cit., pp. 18-19.

[65] I. KSENICZ, *Zwolnienia*, cit., p. 205 and ref. 36.

[66] K. KRZYSZTOFEK, *Wolność sumienia i religii pracownika w świetle przepisów prawa polskiego i prawa europejskiego*, in P. STANISZ, A.M. ABRAMOWICZ, M. CZELNY, M. ORDON, M. ZAWIŚLAK (eds.), *Aktualne problemy wolności myśli, sumienia i religii*, Lublin, Wydawnictwo KUL, 2015, p. 182.

It is unclear whether the right to exemption from work is granted only to members of religious associations with recognised legal status or to all[67]. Some scholars, citing, as a rule, the principle of equality of all churches and religious associations, tend to favour the latter option[68]. It is worth adding that, although this is an important doubt from a theoretical perspective, in practice it does not seem to be of much significance, as the status of a considerable number of the main religious minorities present in Poland has been regulated at the statutory level.

On the other hand, it seems that the most important problem is the possibility to apply the discussed provision to non-employees. As a matter of principle, the entitlement to days off is granted to employees within the meaning of the Polish Labour Code. The problem lies, however, in the fact that in practice a substantial number of people in Poland are employed on the basis of civil law contracts (e.g. service contracts)[69]. Moreover, it is not uncommon for them to work under employee-like conditions[70]. It is accepted in the literature that, as the law currently stands, there is no basis for extending this entitlement also to non-employees[71]. Undoubtedly, such a solution may raise doubts from the point of view of the realisation of the freedom of conscience and religion guaranteed by the Constitution.

5.1.2. *Conscience clause*

It is worth dedicating a few words to another instrument that can be considered a manifestation of reasonable accommodation on the grounds of religion in Polish law, namely the so-called conscience clause. It applies to doctors, as well as to nurses and midwives. Pursuant to Article 39 of the Act of 5.12.1996 on the Profession of physician and dentist, a doctor may refrain from performing health care services that are against his or her conscience, with the caveat that he or she must record this fact in the medical documentation. In addition, a doctor practising under an employment relationship is also obliged to notify his or her supervisor in writing in advance. The conscience clause may not be applied in cases where a delay in the provision of the service could cause a risk of loss of life, grievous bodily harm or serious disorder of health. A similar provision (albeit more

[67] I. NOWAK, *Prawo*, cit., p. 127.

[68] *Ibid.*, p. 127. Another justification, referring to the concepts present in the legislation regulating the issues of churches and religious associations is presented by K. KRZYSZTOFEK, *Wolność*, cit. [w:] P. STANISZ, A.M. ABRAMOWICZ, M. CZELNY, M. ORDON, M. ZAWIŚLAK (eds.), *Aktualne*, cit., p. 181. Similarly: M.A. MIELCZAREK, *Realizacja*, cit., p. 250.

[69] According to the Central Statistical Office (GUS), in 2021 there were approximately 0.9 million people - see GUS, *Wybrane zagadnienia rynku pracy - dane za 2021 r.*, in "Informacje sygnalne", 30.12.2022, p. 2.

[70] A. MUSIAŁA, *Zatrudnienie niepracownicze*, Warsaw, Difin, 2011, p. 7.

[71] See: M. KUŁAK, *Prawa*, cit., pp. 19-20.

extensive and imposing more additional obligations) is found in the Act of 15.07.2011 on Nursing and midwifery professions[72].

The doctors' conscience clause was the subject of an important judgment of the Constitutional Tribunal issued in 2015[73]. The ruling has caused controversy[74]. Prior to its publication, a doctor, when refusing a health service on the basis of the conscience clause, was also obliged to indicate to the patient «the realistic possibilities of obtaining such a service from another doctor or treatment facility». In addition, the doctor was obliged to provide the health service (despite its incompatibility with conscience) in «other cases of urgency». The Tribunal ruled that these provisions were incompatible with the constitutional right of freedom of conscience and religion. According to the judgment, the conscience clause is not a "privilege" granted to doctors, as everyone's freedom of conscience is primary and inalienable, and the law merely vouches for it (para. 4.4.3 of the judgment). The Tribunal took the view that the imposition of an obligation on a doctor to indicate the real possibility of obtaining a service incompatible with his conscience constitutes a restriction on freedom of conscience (para. 6.2.1 of the judgment). Furthermore, it is inefficient from a practical point of view, as the doctor may, for example, have no knowledge of where the patient will be able to receive such a service (para. 6.2.5 of the judgment). With regard to the "cases of urgency", the Tribunal pointed out, in turn, that this concept gives rise to difficulties of interpretation because of its generality, and may therefore lead to an impermissible interference with a doctor's freedom of conscience (para. 5.2.1, 5.2.3 and 5.3.5 of the judgment).

In the situation at hand, we are faced with an attempt to balance two conflicting interests: the "moral integrity" of the doctor and the interest of the patient[75]. In other words, it is an attempt to resolve the conflict that can sometimes arise between two constitutional rights: the right to healthcare and the freedom of conscience[76]. This conflict is actualised in cases such as, e.g. abortion or euthanasia. The literature emphasises that the mechanism in question can be described as a "special accommodation" for those who may find themselves in this type of conflict situation[77]. It should be noted, however, that in Polish law the subjective scope of the conscience clause is narrowed only to the professions mentioned above. It is controversial whether it is possible to extend it also to other professional groups. There are authors who take the view that such an extending interpretation is unauthorised, as the conscience clause is explicitly guaranteed only

[72] Article 12 of the Act of 15.07.2011 on Nursing and midwifery professions.

[73] Constitutional Tribunal, K 12/14, 7.10.2015.

[74] See e.g. P. SZUDEJKO, *Zakres klauzuli sumienia. Glosa do wyroku TK z dnia 7 października 2015 r., K 12/14*, in "Gdańskie Studia Prawnicze – Przegląd Orzecznictwa", 2016, no. 3, pp. 107-115.

[75] See E. ZIELIŃSKA, B. NAMYSŁOWSKA-GABRYSIAK, *Article 39*, in E. ZIELIŃSKA (ed.), *Ustawa o zawodach lekarza i lekarza dentysty. Komentarz*, Warsaw, Wolters Kluwer, 2022, p. 881.

[76] See more: M. KOBAK, *Konstytucyjne prawo do ochrony zdrowia a klauzula sumienia lekarza*, in Z. DUNIEWSKA, M. STAHL (eds.), *Odpowiedzialność administracji i w administracji*, Warsaw, Wolters Kluwer, 2013, p. 363.

[77] M. KUŁAK, *Prawa*, cit., p. 20.

for doctors, nurses and midwives[78]. In turn, the Minister of Health, on the basis of the Constitutional Tribunal judgment already cited, provided an interpretation in 2017 according to which pharmacists - although there is no relevant provision among the regulations governing this profession - may also refuse to sell a medicinal product on the basis of the conscience clause, as this right derives directly from the freedom guaranteed by the Constitution[79].

In the context of the discussion on the possibility of extending the conscience clause to other professions, another case is worth evoking. In recent years, there has been a high-profile case in Poland involving the refusal of a service on the grounds of worldview. It stirred up a lot of controversy and was widely commented on in the media. In 2015, an employee of a printing company refused to print a roll-up for an organisation defending the rights of LGBTQ. He pointed out that «we do not contribute to the promotion of the LGBT movement with our work»[80]. This case has been the subject of several court decisions. The court of first instance convicted the printmaker under a provision that prohibits deliberate, unjustified refusal of services[81]. The judgment was upheld by the District Court, as well as by the Supreme Court. The first one held that a person's religious convictions may not constitute a legitimate ground for refusing to provide a service[82]. The Supreme Court, in turn, focused on the nature of the service provided. It held that insofar as, in the performance of a particular service, a conflict of fundamental freedoms and rights arises between the provider and the consumer, religious beliefs may be a legitimate reason for refusing to provide a service. It means that where they are manifestly incompatible with the characteristics and nature of the service, it is permissible to refuse to provide it, even if they are in conflict with other values, including constitutional ones, such as the prohibition of discrimination. Such a right does not apply to the printer in question. His action was only reproductive and involved the performance of technical activities. In addition, a refusal to provide a service cannot be justified by the individual characteristics of the persons (e.g. religious beliefs, manifested views or sexual preferences) to whom the service is to be provided[83]. As a result of this ruling, the case was referred to the Constitutional Tribunal by the Minister of Justice-General Prosecutor. The Tribunal held that the provision, under which the printmaker was convicted (unjustified refusal to provide services) was unconstitutional as it is not appropriate to the legislative objectives pursued. It also indicated that legal solutions which implicitly seek to restrict the freedom of private entities to conclude contracts and which, in addition, penalise the failure to provide the services in question when the obligation to provide such services does not arise

[78] See more: *Ibid.*, pp. 20-21.

[79] Minister Zdrowia, *Note No PRL073.6.2017.JS.1*, 5.10.2017.

[80] P. KOŚMIŃSKI, *"Osoby najsłabsze zostały porzucone". Sąd Najwyższy ostro o decyzji Trybunału Konstytucyjnego*, in *https://wyborcza.pl/7,75398,26586207,slynna-sprawa-drukarza-z-lodzi-znow-w-sadzie-najwyzszym-osobiscie.html.*

[81] Local Court for Łódź-Widzew, VII W 1640/16, 31.03.2017.

[82] District Court in Łódź, V Ka 557/17, 26.05.2017.

[83] Supreme Court, II KK 333/17, 14.06.2018.

directly from the legal rules, undermine confidence in the State and the rule of law, since they are inappropriate to the purpose of the regulation and constitute excessive interference on the part of the legislature in the sphere of individual freedom[84]. As a result of the unconstitutionality of the aforementioned provision, the case returned to court, which overturned the ruling in which the print shop employee was convicted, and discontinued the proceedings[85]. Following an appeal, the case went back to the Supreme Court, but the latter dismissed it[86]. As can be seen from this long-standing court case and the fiery discussion around it, the issue of the admissibility of the conscience clause is still a matter of intense debate in Poland.

5.2. *Workers with family responsibilities*

Although, as already mentioned, the concept of reasonable accommodation only exists in relation to disability, it seems that in the Polish labour law system many manifestations of reasonable accommodation for persons with family responsibilities can be found. Since 2004, Polish labour law has successively granted more and more rights related to the role of parent performed by many employees[87]. The literature points out that the sphere of care is an important determinant of a worker's position in the labour market, primarily because the worker decides how much of his or her time can be devoted to work[88]. In Polish labour law caregiving is, in principle, equated with parenthood, as evidenced, for example, by the title of Section 8 of the Labour Code - «Employees' rights related to parenthood». It is the employer who ensures that the basic rights of the employee-parent are realised[89]. In light of the objectives of this article, it is relevant that these rights are divided into two groups: those directly related to the implementation of the protective function and those related to the adaptation and organisation of the work process[90]. Given that the focus of this analysis is on the manifestations of reasonable accommodation related to persons with family responsibilities, it is the latter group that will be analysed, as these rights impose some obligation on the employer to take positive actions, and do not merely involve the prohibition of certain measures[91]. Another important classification

[84] Constitutional Tribunal, K 16/17, 26.06.2019.

[85] Court of Appeal in Łódź, II AKo 91/19, 30.12.2019.

[86] Supreme Court, II KA 1/20, 8.12.2020.

[87] I. JAROSZEWSKA-IGNATOWSKA, Z. ROSNER-LASKORZYŃSKA, *Uprawnienia pracowników-rodziców*, Warsaw, Wolters Kluwer, 2021, pp. 17-18.

[88] B. GODLEWSKA-BUJOK, in K.W. BARAN, M. GERSDORF, K. RĄCZKA (eds.), *System*, cit., p. 978.

[89] Cf. J. CZERNIAK-SWĘDZIOŁ, *Rola pracodawcy w realizowaniu uprawnień pracowników związanych z rodzicielstwem*, in "Acta Universitatis Wratislaviensis", 2018, no. 3844, *Przegląd Prawa i Administracji CXIII*, p. 24.

[90] *Ibid.*

[91] Cf. Ł. PISARCZYK, M. WUJCZYK, in K.W. BARAN, M. GERSDORF, K. RĄCZKA (eds.), *System*, cit., p. 67.

points in turn to: (i) the entitlements of working parents related to pregnancy, and (ii) the entitlements of working parents and carers related to the birth and raising of a child[92]. As the present study focuses on the issue of persons with family responsibilities, only the latter group will be considered.

At the very beginning, it should be noted that the vast majority of entitlements in question are provided for in the Labour Code. Therefore, they are granted only to employees, i.e. persons employed on the basis of the Labour Code (however, this does not apply to social insurance benefits, e.g. maternity allowance, which may be granted also to persons employed on other bases, as long as they are covered by sickness insurance[93]). The issue is that - as already mentioned when discussing reasonable accommodation in relation to religion - a significant number of people in Poland provide work on the basis of civil law contracts, which are not subject to labour law. As a consequence, a sizable group of persons performing work is deprived of the possibility to adjust their working conditions to the role of caregiver. Undoubtedly, this is a significant problem both legally and, above all, socially.

5.2.1. *Flexible work organisation*

A new instrument introduced in April 2023[94] is the so-called flexible work organisation (Article 188[1] of the Labour Code). This is the result of the implementation of the Work-life balance directive into the Polish legal order[95]. Flexible work organisation applies to an employee raising a child up to the age of eight. It should be underlined that the mere fact of bringing up a child is relevant, no legal bond is necessary[96]. Importantly, as emphasised in the literature, «this regulation does not introduce a new way of organising work, but it makes the already existing possibilities for the employee to benefit from a convenient time or place of work more readily available»[97]. Flexible work organisation can be considered reasonable accommodation applied by the employer. Its aim is to take account of the particular care situation faced by workers raising young children. Moreover, the Directive itself indicates in recital (34) that it is supposed to «encourage workers who are parents and carers to remain in the workforce, such workers should be able to adapt their working schedules to their personal needs and preferences». Flexible work organisation includes: (i) remote work, (ii)

[92] B. GODLEWSKA-BUJOK, in K.W. BARAN, M. GERSDORF, K. RĄCZKA (eds.), *System*, cit., p. 983.

[93] They are provided for in the Act of 25.06.1999 on Cash benefits from social insurance in the event of sickness and maternity.

[94] Act of 09.03.2023 on amending the Labour Code and certain other acts.

[95] Directive (EU) 2019/1158 of the European Parliament and of the Council of 20.06.2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

[96] E. MANIEWSKA, *Article 188[1]*, in K. JAŚKOWSKI, E. MANIEWSKA, *Kodeks pracy. Komentarz aktualizowany*, LEX/el., 2023.

[97] *Ibid.*

intermittent working time system, (iii) shortened working week system, (iv) weekend working scheme, (v) flexible working time schedule, (vi) individual working time schedule, (vii) reduction of working hours. Importantly, the request is not binding on the employer - it is therefore not under an absolute obligation to apply reasonable accommodation. It is, however, obliged to consider the request, taking into account the following factors: the needs of the employee, (including the timing and reason for the need to use flexible work organisation), as well as the needs and capabilities of the employer, (including the need to ensure the normal workflow, the organisation or the type of work performed by the employee).

As a side note, it is worth mentioning that the regulations on remote work separately establish a "soft claim" for remote work[98] for several categories of employees, including an employee raising a child up to the age of four. In this case, the employer is obliged to grant a request for remote work, unless this is impossible due to the nature or organisation of the employee's work (Article 67^{19} para. 6 of the Labour Code). The literature indicates that this is related to the implementation of family-friendly policy[99].

5.2.2. *Leaves and days off*

An important tool for providing reasonable accommodation to employee-parents are parenthood-related leaves. There are 5 types of such leaves in Polish labour law. These are:

1. Maternity leave of, as a rule, up to 20 weeks (Article 180-182 and 183^{1}-184 of the Labour Code);
2. Paternity leave of up to 2 weeks (Article 182^{3} of the Labour Code);
3. Parental leave of, as a rule, up to 41 weeks (Article 182^{1a}-182^{1g} of the Labour Code);
4. Childcare leave of up to 36 months (Article 186-186^{8} of the Labour Code);
5. Adoption leaves (Article 183 of the Labour Code).

As the above catalogue shows, parenthood-related leaves are relatively long in Poland, which enables employee-parents to fulfil their caring responsibilities. They are granted, under certain specific conditions, to the child's mother, father or other members of the immediate family. As a principle, the above time limits apply cumulatively to all persons entitled to the leave in question. Importantly, if an employee applies for such leave, the employer is obliged to grant it.

Reasonable accommodation for persons with family responsibilities is also demonstrated by the fact that the Polish legislator provides flexible possibilities to

[98] M. MĘDRALA, *Praca zdalna. Kontrola trzeźwości pracowników. Wzory. Przewodnik po nowych przepisach Kodeksu pracy*, Warsaw, Wolters Kluwer, 2023, p. 45.

[99] A. SOBCZYK, *Article 67^{19}*, in A. SOBCZYK (ed.), *Kodeks pracy. Komentarz*, Warsaw, C.H. Beck, 2023, p. 430.

combine certain types of leave with performing work. While on parental leave, an employee may combine it with performing work for his or her employer to a maximum of half of the full working time (in this case, total parental leave length is increased proportionally). The employer is obliged to grant the employee's request, unless this is not possible due to the organisation or nature of the work. Two types of flexible arrangements also apply to an employee entitled to childcare leave. Firstly, during childcare leave, the employee has the right to take up gainful employment with his/her previous or other employer, or other activities, as well as study or training, as long as this does not exclude the possibility of taking personal care of the child. The second entitlement available to the employee is to request the employer to reduce his/her working hours to no less than half of full-time during the period in which he/she could take childcare leave. The employer is obliged to grant the employee's request. Importantly, the use of reduced working hours does not reduce the length of the childcare leave itself.

A whole range of breaks and time off for employees with family responsibilities may also qualify as reasonable accommodation in terms of working time. The employer is obliged to adjust the working time of this group of employees in line with their caring responsibilities. Among the entitlements are:

1. Breaks for breastfeeding (Article 187 of the Labour Code);
2. 2 days off per calendar year - to provide care to a child under 14 years of age (Article 188 of the Labour Code);
3. 5 days' unpaid carer's leave per calendar year - to provide personal care or support to a person who is a member of the family (children, parents or spouse) or living in the same household and who requires care or support for serious medical reasons (Article 173^1 of the Labour Code);
4. 2 days' leave per calendar year - due to force majeure for urgent family matters caused by illness or accident if the employee's immediate presence is required (Article 148^1 of the Labour Code);
5. Up to 60 days off per calendar year - in case of the need for personal care of a child or other sick family member (Article 32-35 of the Act of 25.06.1999 on Cash benefits from social insurance in the event of sickness and maternity).

As a final consideration, it is worth mentioning that, although the term "reasonable accommodation" appears in the case law in relation to disability, parental entitlements in the context of discrimination have also been the subject of judgments. For example, the Supreme Court held that a supervisor who repeatedly annoys, harasses or obstructs a subordinate in the exercise of her entitlements for raising minor children, resulting in the employee developing an adaptive depressive-anxiety disorder, commits mobbing[100].

[100] Supreme Court, II PK 243/17, 18.12.2018.

5.3. *Caregivers of persons with disabilities*

Polish law provides for additional accommodation in terms of work organisation for employees (usually parents) providing care to persons with disabilities. There are several categories of such employees, depending on the type of disability of the person they are caring for.

Firstly, certain requests by such an employee for flexible working arrangements are, in principle, binding on the employer (Article 142^1 of the Labour Code). They concern the employee-parent of, i.a.: (i) a child with a special certificate specified in the Act on Support for pregnant women and families "For life", (ii) a child with a certificate of disability or a certificate of moderate or severe disability, (iii) or a child with an opinion on the need for early development support, a certificate on the need for special education or a certificate on the need for remedial classes. The employer must grant the request of such an employee for: (i) an intermittent working time system, (ii) a flexible working time schedule, (iii) an individual working time schedule - unless this is not possible due to the organisation or type of work of the employee concerned. Importantly, employees also retain this entitlement once the child reaches the age of 18. An analogous provision is provided for the request for remote work (Article 67^{19} of the Labour Code), with the catalogue of employees who may make such a request being even broader, as it also includes an employee caring for another member of the immediate family or another person in the household with a disability certificate or a certificate of significant disability. It may be indicated that the above groups of workers have been granted a so-called "soft claim" for the types of work organisation indicated above[101].

Another type of accommodation for employee-carers of persons with disabilities is longer parental leave (Article 182^{1a}, 183 and 186 of the Labour Code). Parents of a child with a special certificate, as defined in the Act on Support for pregnant women and families "For life", are entitled to up to 65 or 67 weeks of parental leave to care for that child. An analogous solution is adopted in the case of adoption of such a child - the parental leave is extended to 62, 65 or 67 weeks, depending on the case. Moreover, if, due to a health condition confirmed by a disability certificate, a child requires personal care of the employee, an additional parental leave of up to 36 months may be granted, in addition to the standard parental leave, (may be used until the child reaches 18 years of age).

Finally, with regard to the entitlement to days off in case of the need for personal care of a child or other sick family member (Article 33 of the Act on Cash benefits from social insurance in the event of sickness and maternity), a separate maximum benefit period for this absence from work has been established for an employee caring for a child with a severe disability certificate or a specific type of disability certificate specified in this Act, up to the age of 18, in case of his/her

[101] See on this term in relation to the employee's request for remote work: M. MĘDRALA, *Praca*, cit., p. 45.

illness or in other cases indicated in the Act. The benefit period lasts then for a maximum of 30 days per calendar year.

6. *Türkiye*

6.1. *Conceptual Point of View*

In the Turkish legal system, Article 10 of the Constitution of the Republic of Türkiye has set forth the (general) principle of equality as a principle that is valid in the entire legal system and is required to be taken into account in relations between individuals[102]. According to the aforementioned article, «Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds. Men and women have equal rights. The State has the obligation to ensure that this equality exists in practice. Measures taken for this purpose shall not be interpreted as contrary to the principle of equality. Measures to be taken for children, the elderly, disabled people, widows and orphans of martyrs as well as for the invalid and veterans shall not be considered as violation of the principle of equality…». The Turkish Constitutional Court states that equality before the law does not mean that everyone shall be subject to the same rules; it means, rather, that the presence of some special conditions may require different rules and adjustments[103]. For instance, «Minors, women, and physically and mentally disabled persons shall enjoy special protection with regard to working conditions» (Article 50, para. 2 of the Constitution).

Reasonable accommodation, which is a concept derived from the right to equality and non-discrimination, is legally considered as making adjustments in favour of individuals with disabilities. The concept of "reasonable accommodation" has been defined by Article 3, lett. j (added on 06.02.2014) of the Law on Disabled Persons (no. 5378) as: «Necessary and appropriate modifications and measures, which do not impose a disproportionate or undue burden, needed in a given circumstance to enable the disabled to fully exercise and benefit from their rights and freedoms on an equal basis with others». A similar definition has been made by Article 2, para. 1, lett. i of the Law on the Human Rights and Equality Institution of Türkiye (no. 6701) as: «Proportional, necessary and appropriate modifications and measures taken to the extent allowed by financial means and needed in a given circumstance to enable the disabled to fully exercise and benefit from their rights and freedoms on an equal basis with others». And failure to provide reasonable accommodation is considered as a type of discrimination within the scope of this Law (Art. 4, para. 1, lett. f of the Law no. 6701).

[102] E. T. SENYEN KAPLAN, *İş Hukukunda Eşitlik İlkesi ve Cinsiyet Ayrımcılığı*, in "Türkiye Barolar Birliği Dergisi", 2017, Special Issue, p. 236.

[103] See: Turkish Constitutional Court, 2020/95, 2022/3, 26.01.2022, para. 25.

When considering the above-mentioned definitions[104] of reasonable accommodation, it may be stated that reasonable accommodation is legally regulated to eliminate the challenges faced by disabled individuals only. However, it should go beyond disability, based on the principle of equality for all. In this respect, it should be noted that reasonable accommodation is of utmost importance in the work environment, even though there is no such a regulation explicitly named "reasonable accommodation" in Turkish labour law.

The principle of equal treatment is regulated by Article 5 of the Turkish Labour Code (no. 4857) as: «No discrimination based on language, race, colour, sex, disability, political opinion, philosophical belief, religion and sect, or similar reasons is permissible in the employment relationship». Given that employees spend a considerable amount of time[105] in the work environment and that the work environment is a melting pot of diversity with all the employees coming from different backgrounds, the concepts of "equality" and "non-discrimination" require special attention. In this regard, adaptation of the work environment plays a key role. However, in the employment relationship, the employees' rights, obligations and interests might conflict with the employer's rights, obligations and interests. Basically, the employer has the managerial prerogative, which includes giving orders and making operational decisions, based on the right to the freedom of enterprise guaranteed by Article 48 of the Constitution[106]; on the other hand, employees have an obligation to comply with their employer's orders and decisions. Article 399 of the Turkish Code of Obligations (no. 6098) clearly states that «The employer can make general arrangements about the performance of the job and the behaviours of the employees in the workplace and can give them special orders. The employees must abide by them to the extent required in accordance with the integrity». At this point, it should be noted that the managerial prerogative may not be considered absolute, and it may be exercised only in a way that does not violate the fundamental rights of employees[107]. The principle of equal treatment also performs the function of restricting the managerial prerogative and of controlling the behaviours of the employer[108].

In Türkiye, since "reasonable accommodation" is a relatively novel concept for legal scholars and judicial bodies, any clearly objective criteria for resolving a conflict stemming from the need for reasonable accommodation do not exist. It may be suggested that an organisational model[109] should be adopted, besides a case-

[104] The quoted definitions are in line with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) which was duly ratified by Türkiye in 2009.

[105] Employees spend, on average, 44.9 hours a week at work, according to the data of January 2023 provided by the Turkish Statistical Institute.

[106] However, it is also argued that the employer's managerial prerogative flows from the employment contract itself. See: S. SÜZEK, *İş Hukuku*, Istanbul, Beta, 2021, p. 86.

[107] M. SUR, *İşverenin Yönetim Hakkının Çağdaş Sınırlamaları ve Sosyal Diyalog*, in E. DEMIR, B. GEMICI FILIZ (eds.), *Prof. Dr. Turhan Esener III. İş Hukuku Uluslararası Kongresi*, Ankara, Seçkin, 2021, p. 25.

[108] Ş. ERTÜRK, *İş İlişkisinde Temel Haklar*, Ankara, Seçkin, 2002, p. 108. See also: Turkish Court of Cassation 9th Civil Chamber, 2017/28065, 2020/2946, 25.02.2020.

[109] See below: § 7.

by-case approach to strike a fair balance in a conflict between the employee and the employer, and the duty of good faith should not be overlooked. In practice, most of the problematic cases emerge due to the difficulty of striking a balance in the employment relationship. Currently, there are two major topics worth pondering upon: *religion* and *family responsibilities*.

6.2. *Religion*

The freedom of religion and conscience is guaranteed under the Constitution of the Republic of Türkiye. According to Article 24 of the Constitution, «Everyone has the freedom of conscience, religious belief and conviction. Acts of worship, religious rites and ceremonies shall be conducted freely, as long as they do not violate the provisions of Article 14. No one shall be compelled to worship, or to participate in religious rites and ceremonies, or to reveal religious beliefs and convictions, or be blamed or accused because of his religious beliefs and convictions…». The cited Article 14 states that «None of the rights and freedoms embodied in the Constitution shall be exercised in the form of activities aiming to violate the indivisible integrity of the State with its territory and nation, and to endanger the existence of the democratic and secular order of the Republic based on human rights…». To put it simply, employees can practise their religion freely unless the practices are against the integrity of the State, or the democratic and secular order of the Republic based on human rights. Article 9 of the European Convention on Human Rights, to which Türkiye is a party, should also be reiterated in this context: «Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others».

The Republic of Türkiye is a secular state governed by rule of law, with no official religion, as stated in the Constitution. However, in practice, it is known that Muslims constitute the vast majority of the population of Türkiye[110]. In Turkish labour law, pursuant to Article 5 of the Turkish Labour Code (as quoted under § 6.1.), employers may not discriminate against employees based on religion. If the employer violates the obligation of equal treatment, employees subjected to discrimination may claim compensation (up to four months' wage) and other rights of which they have been deprived. Overall, it may be stated that the existing legal

[110] Muslims constitute 99.2% of the population of Türkiye, and the rest belong to other religions or do not follow any religion, according to the data of 2013 provided by the Turkish Statistical Institute and the Presidency of Religious Affairs in 2014.

regulations are neutral, even though they were made based on the population, most of whom are Muslim. There is an exceptional situation in the Law on National Festivals and General Holidays (no. 2429) which tends to address the social needs of Muslims rather than of minorities. In the aforementioned legal regulation, it is set forth that three and a half days are holidays for the Feast of Ramadan and that four and a half days are holidays for the Feast of Sacrifice. Employees shall be paid a full day's wage for the holidays on which they have not worked. If they work on the holidays, they shall be paid an additional full day's wage for each day worked. However, any legal regulation granting the minorities holiday leave for religious observances does not exist.

In general, Muslim employees and employees of other faiths and those of no faith perform their job duties all together in the work environment. It is important to bear in mind that all employees, including irreligious ones, may need reasonable accommodation for religious belief or disbelief. Given that religious practices may even differ between sects of a religion, reasonable accommodation for religious reasons in the work environment, which refers to making adjustments enabling employees to practise their religious beliefs, becomes more complicated. There is the managerial prerogative on one side, and the right to freedom of religion and conscience on the other side. Since there is no explicit regulation on this matter, in practice, religious matters are settled based on mutual understanding and tolerance in the employment relationship[111]; and civil society organisations also work on these matters[112]. As an ideal rule, the employer should provide reasonable accommodation for sincerely held religious beliefs or practices unless to do so would impose an undue burden, irrespective of the religion employers or employees adhere to. However, as a matter of fact, not all the employers are concerned about their employees' personal beliefs, or not all the works/workplaces are suitable for such accommodation. Religious conflicts at work generally arise regarding dress as a manifestation of religion, hours of work, refusal to perform duties on religious grounds[113]. In Türkiye, reasonable religious accommodation specifically concentrates on *wearing headscarf* and *worshipping*.

[111] «If protecting victims against discriminative acts is the first step, then the development of democratic and tolerant societies requiring participation of all citizens, irrespective of gender, race and ethnic origin, religion or belief, disability, age or sexual orientation is the second one. An effective implementation of the principle of equal treatment requires more than just the solving of individual conflicts. Thus, discrimination is not merely a problem of the parties to the contract of employment, but also for other bodies also concerned under the frame of mainstreaming policies». See: K. DOĞAN YENISEY, *Harmonisation of Turkish Law with EU's Regulations in Respect of Equal Treatment*, in "Managerial Law", 2005, vol. 47, no. 6, p. 248.

[112] It is reported that civil society organisations in Türkiye make crucial contributions in areas, such as rights of persons belonging to minorities, rights of persons with disabilities, freedom of religion and belief, anti-discrimination, among others. See: European Commission, *Türkiye 2023 Report*, p. 16.

[113] H. COLLINS, K. D. EWING, A. MCCOLGAN, *Labour Law*, Cambridge, Cambridge University Press, 2019, pp. 455-458.

6.2.1. *Wearing Headscarf*

Most professions have some form of dress code, and employers have the power to establish dress and grooming regulations in the workplace through their managerial prerogative. As distinct from regular dress and grooming rules, wearing (Islamic) headscarf is an element of piety, but sometimes it is also considered as a political symbol. Hence, wearing a headscarf falls within the scope of the freedom of expression as well as the freedom of religion and conscience. The freedom of expression -like the freedom of religion and conscience- is protected as a fundamental right under the Constitution. It should be noted that engaging in an employment relationship does not lead to the disappearance of fundamental rights and freedoms. The work environment is one of the places where employees may exercise their fundamental rights and freedoms, even if it is not the ideal place for the exercise of the freedom of expression[114].

Theoretically, the employer cannot compel the employee to wear or to take off the headscarf. However, in practice, employers tend to put pressure on their employees. For instance, in a relatively recent case[115] in which an employer insulted a female employee who was wearing a headscarf and put pressure on her to take off it, the Turkish Court of Cassation concluded that the employer cannot force the employee to take off her headscarf, citing the *Eweida Case*[116] of the European Court of Human Rights. The Turkish Court of Cassation emphasised that the employee's clothing style is considered within the scope of personal rights, and the employer is obliged to protect and respect the personality of the employee and also to establish an order in the workplace in accordance with the integrity standards, pursuant to Article 417, para. 1 of the Turkish Code of Obligations.

Wearing a headscarf should also be examined in terms of occupational health and safety. In some cases, wearing a headscarf may pose a risk to employees' health and safety. For instance, in a case[117] that appeared before the Turkish Court of Cassation, a female employee was working in a position in which she could be exposed to electrical hazards at a company producing electronic cards. Whilst she was wearing a headscarf in her daily life, she was not wearing it in the workplace. After many years, the management changed. And the new management established a rule not to wear anything that covers the head, other than the hair restraints specified by the employer, in order to eliminate occupational health and safety risks related to the electrical conductivity. She resisted that rule and started to wear her headscarf in the workplace. In this case, the Court emphasised the obligation of the employer to take all necessary measures to ensure occupational health and

[114] S. ÖKTEM SONGU, *Anayasal Bir Temel Hak Olarak İfade Özgürlüğünün İşçi Açısından İşyerindeki Yansımaları*, in "Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi", 2013, vol. 15, Special Issue, p. 626.

[115] Turkish Court of Cassation 9th Civil Chamber, 2020/3027, 2020/10966, 07.10.2020.

[116] ECtHR, 48420/10, 59842/10, 51671/10 and 36516/10, *Eweida and Others v. the United Kingdom*, 27.05.2013.

[117] Turkish Court of Cassation 9th Civil Chamber, 2015/14396, 2015/22303, 18.06.2015.

safety in the workplace and to keep the equipment complete; and the obligation of the employee to comply with the measures regarding occupational health and safety (as prescribed in Article 417, para. 2 of the Turkish Code of Obligations and in specific legislation on occupational health and safety). The Court stated that it should be technically determined whether wearing headscarf while working may adversely affect occupational health and safety, and also *ex officio* examined the employee's behaviour (i.e. wearing headscarf in the workplace after the prohibition was established) in terms of bad faith.

It may be argued that, in some circumstances, a restriction on wearing headscarf should be considered justifiable by the employer's reasonable need to present a neutral image towards customers or to prevent social disputes[118]. In a case where the employer prohibits the employee, who makes face-to-face contact with customers, from wearing headscarf according to the policy of neutrality; or in a case where the employer prohibits the employee from wearing headscarf because occupational health and safety or hygiene rules need to be followed, the employer's managerial prerogative should be protected over the employees' freedoms at issue. However, to be protected, the employer should act in accordance with the principle of equal treatment and good faith when exercising his/her managerial prerogative. Furthermore, the employer should try to make alternative accommodations, such as assigning the employee to a position without face-to-face customer contact or to a position that does not require the employee to follow the strict rules regarding occupational health and safety or hygiene[119]. The employer should be careful not to worsen the working conditions of the employee and not to put her at a disadvantage when relying on a legitimate interest.

All these matters should be examined rigorously since there is a fine line between providing reasonable accommodation and violating the freedom of religion and the freedom of expression. It should not be forgotten that «in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected»[120].

[118] Similarly, see: ECJ, C-804/18 and C-341/19, *IX v WABE and MH Müller Handels v MJ*, 15.07.2021, stating that «an internal rule of an undertaking prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, may be justified by the employer's desire to pursue a policy of political, philosophical and religious neutrality with regard to its customers or users, in order to take account of their legitimate wishes (...) it should be noted that both the prevention of social conflicts and the presentation of a neutral image of the employer *vis-à-vis* customers may correspond to a real need on the part of the employer». See also: ECJ, C-344/20, *L.F. v SCRL*, 13.10.2022, stating that «an internal rule of a private undertaking prohibiting the wearing of any visible sign of political, philosophical or religious belief in the workplace does not constitute direct discrimination on the [ground] of religion or belief» if the employer «treats all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, *inter alia*, to dress neutrally, which precludes the wearing of such signs».

[119] D. DULAY YANGIN, *İşyerinde Dini Sembollerin Kullanımı (Karar İncelemesi)*, in "Çalışma ve Toplum Dergisi", 2019, no. 62, pp. 2068-2069.

[120] ECtHR, 44774/98, *Leyla Şahin v. Turkey*, 10.11.2005, para. 106; ECtHR, 14307/88, *Kokkinakis v. Greece*, 25.05.1993, para. 33.

6.2.2. *Worshipping*

Worship is a comprehensive concept that includes prayers, pilgrimages, fasting, and so on. Each religion has its own requirements. Some religions require prayers at certain times, and some require pilgrimages for specific durations. In legal terms, there is no difference between religions practised during the employment relationship, since the existing legislation grants neither the Muslims nor the non-Muslims provisions that oblige the employer to reasonably accommodate the worship (except for the holiday leaves, as stated under § 6.2.). In Türkiye, most of the conflicts on the matter of religion arise from the Islamic practices (it's maybe because Muslims constitute the vast majority of the population or maybe for some other reasons). Specifically, most of the cases that appeared before the Turkish Court of Cassation are related to the Friday prayer; and a few are related to the Islamic pilgrimage, called the "Hajj". As a background information, the Friday prayer is a particular act of prayer required to be performed by the Muslim men in a mosque on Friday afternoon at the time of the call to prayer; and the Hajj is a pilgrimage required to be performed (for a duration of several days) by every Muslim once in a lifetime. These requirements generally conflict with the work schedules.

It should be noted that the employee may not practise his/her religion freely in the case of a conflict between religion and work. When determining whether the employer is expected to provide reasonable religious accommodation, such as adjusting the work schedules, setting up a prayer room, or providing transportation to and from the mosque for the employee, some factors should be taken into account. To name a few, the convenience of the work/workplace, the nature of the act of worship at issue, and the balance between the employer's rights and obligations and the employee's rights and obligations should be considered. For instance, in a case[121], the employee -who was working as a member of the technical support team in a factory- requested a break for the Friday prayer. However, the employer rejected the request because the absence of tech staff could disrupt the production process in the case of a technical glitch. In another case[122], in which the employee -who was a teacher at a private high school- requested unpaid leave for the Hajj and the employer rejected the request because the period of the pilgrimage coincided with academic semester, the Turkish Court of Cassation stated that the employer was expected to allow the employee to go to the Hajj, within the scope of the obligation to protect the employee's personality. The Court emphasised the nature of the Hajj as being performed in a specific period of the year after a gruelling process to be eligible for the pilgrimage. Besides the factors above, customary practices should also be taken into consideration. For instance, in a case[123], in which the employer had provided the employee with the opportunity to

[121] Turkish Court of Cassation 9th Civil Chamber, 2014/36660, 2015/3283, 26.02.2015.
[122] Turkish Court of Cassation 9th Civil Chamber, 2014/664, 2014/4313, 12.02.2014.
[123] Turkish Court of Cassation 9th Civil Chamber, 2009/13474, 2011/23572, 12.07.2011.

perform the Friday prayer for over 5 years, and after all that time, abolished that custom, the Turkish Court of Cassation considered abolishing a customary practice in the workplace as a radical change against the employee. It is also argued that providing an employee with the opportunity to perform the Friday prayer does not, *per se*, entitle other employees to request for the same opportunity, since the operational needs and decisions of the employer, among other conditions, may differ from case to case[124]. It may be argued not only for the cases in which the Friday prayer is at issue but also for all the cases on the matter of worship.

Other than the above-mentioned controversial issues, as a general rule, the employer should provide reasonable religious accommodation in the workplace, even though there is no specific legal regulation on it. For instance, in a workplace where some of the employees practise religions that require daily prayer, the employer should set up a prayer room, so that the employees would pray without distracting from work. Ideally, a prospective employee should tell the employer about his/her religious practices that require reasonable accommodation, in the recruitment process. However, if the employee's religious practices change during the employment relationship, he/she should notify the employer about the need for such accommodation. If necessary, the employer and the employee should negotiate the request and try to steer a middle course, considering all the circumstances. In the case of a conflict where reasonable accommodation is not applicable at all, the employer should not be expected to maintain the employment relationship, because the freedom of religion is not as comprehensive as the employer bears the financial burden of the religious practices conflicting with his/her own legitimate interests[125].

6.3. *Family Responsibilities*

The Constitution of the Republic of Türkiye laid emphasis on *family*. It stated that «Everyone possesses inherent fundamental rights and freedoms, which are inviolable and inalienable. The fundamental rights and freedoms also comprise the duties and responsibilities of the individual to the society, his/her family, and other individuals» (Art. 12); «Family is the foundation of Turkish society and based on the equality between the spouses. The State shall take the necessary measures and establish the necessary organisation to protect peace and welfare of the family, especially mother and children, and to ensure the instruction of family planning and its practice» (Art. 41, para. 1-2). In this respect, reasonable accommodation for the employees with family responsibilities -such as working new parents, working parents with disabled children, and so on- has a great importance. In the Turkish legal system, there are some regulations on adjustments that employees with family responsibilities need in the employment relationship. Namely, leaves/breaks,

[124] Ş. ERTÜRK, *İş*, cit., p. 109.
[125] *Ibid.*, p. 139.

flexible work schedule arrangements, and other facilities have been prescribed in the legislation, even though none of the provisions explicitly refer to the concept of "reasonable accommodation".

Leaves/breaks are mainly as follows:

- *Paternity leave:* The male employee shall have five days' paid leave in the event of his spouse giving birth (Additional Art. 2, para. 1 of the Turkish Labour Code).

- *Maternity leave:* Female employees must not be engaged in work for a total period of sixteen weeks -eight weeks before the birth and eight weeks after the birth-. In case of multiple pregnancy, an extra two-week period shall be added to the eight weeks before the birth during which female employees must not work. However, a female employee whose health condition is suitable as approved by a physician's certificate may work at the workplace if she so wishes up until the three weeks before the birth. In this case, the time during which she has worked shall be added to the period after the birth (Art. 74, para. 1 of the Turkish Labour Code). Also the female or male employee (only one of the spouses) who adopts a child below the age of 3 shall be granted "maternity leave" for a period of eight weeks after the delivery of the adopted child to the parent.

- *Adoption leave:* The employee shall have three days' paid leave in the event of adopting a child (Additional Art. 2, para. 1 of the Turkish Labour Code).

- *Unpaid leave:* The female employee shall be granted -on request- an unpaid leave up to six months after the expiry of the period of maternity leave. The female or male employee (only one of the spouses) who adopts a child below the age of 3 shall be granted -on request- an unpaid leave up to six months (Art. 74, para. 6 of the Turkish Labour Code).

- *Break for breastfeeding:* The female employee shall have one-and-a-half-hour break a day for breastfeeding in order to feed her child below the age of 1. The employee shall decide herself at what times and in how many instalments she will use this break. The length of the break shall be treated as part of the daily working time (Art. 74, para. 7 of the Turkish Labour Code).

- *Leave for the treatment of the child with disability or chronic illness:* In the treatment of the child having at least 70% disability or chronic illness, the parent-employee shall have paid leave up to ten days totally or partially within a year, based on a medical report and on the condition that it shall be used by only one of the working parents (Additional Art. 2, para. 2 of the Turkish Labour Code).

Flexible work schedule arrangements are mainly as below:

- *Part-time work*

One of the working parents may request to switch to part-time work after the expiry of the periods prescribed in Art. 74 until the beginning of the month following the starting of the compulsory primary education (Art. 13, para. 5 of the Turkish Labour Code).

Also employees who adopt a child below the age of 3 may request to switch to part-time work after the delivery of the adopted child to the parent.

- *Half-time work*

The female employee shall be granted -on request- an unpaid leave as half of the weekly working time for the durations of 60 days for the first birth, 120 days for the second birth, and 180 days for the following births -in multiple births 30 days are added to these durations- (Art. 74, para. 2 of the Turkish Labour Code).

The female or male employee who adopts a child below the age of 3 shall be granted -on request- an unpaid leave as half of the weekly working time for the durations of 60 days for the first adoption, 120 days for the second adoption, and 180 days for the following adoptions (Art. 74, para. 2 of the Turkish Labour Code).

The female employee shall be granted -on request- an unpaid leave as half of the weekly working time for the duration of 360 days in case the child is born disabled (Art. 74, para. 2 of the Turkish Labour Code).

Half-time work is a special work schedule arrangement set forth by the above-mentioned paragraph (i.e. Art. 74, para. 2 of the Turkish Labour Code) which was added to the Law on 29.01.2016. It should be noted that the provision on half-time work coincides with the provision on unpaid leave (i.e. Art. 74, para. 6 of the Turkish Labour Code); the employee may choose either half-time work or unpaid leave (or none)[126]. The employer must arrange the work schedule accordingly, upon the request of the employee; similarly, on request, the employer must grant the employee an unpaid leave. These cannot be left to the discretion of the employer[127].

Other facilities are mainly as follows:

- *Nursing room*
- *On-site childcare facility*

The employer is obliged to set up a nursing room 250 metres (at most) away from the workplace where 100-150 female employees are employed, and to set up an on-site childcare facility close to the workplace where more than 150 female employees are employed (Art. 13 of the Regulation on Working Conditions of Pregnant or Breastfeeding Women, Nursing Rooms and Childcare Nurseries). In a relatively recent case[128] in which some of the female employees were not provided with on-site childcare facility, while some could benefit from it, without an objective and reasonable justification, the Turkish Constitutional Court ruled that the prohibition of discrimination in conjunction with the right to respect for private and family life was violated.

7. *(Non-)Concluding Remarks. Outlines for a proposal* de jure condendo

From the analysis developed so far, several "clues" at the national level seem to lean on the recognition of an obligation for reasonable accommodations beyond

[126] S. SÜZEK, *İş*, cit., p. 889.

[127] N. ÇELIK, N. CANIKLIOĞLU, T. CANBOLAT, E. ÖZKARACA, *İş Hukuku Dersleri*, Istanbul, Beta, 2023, pp. 840-844.

[128] See: Turkish Constitutional Court, *Burcu Reis*, application no. 2016/5824, 28.12.2021.

disability. It is worth noting that the presence of such clues, along with those identified at the international and supranational levels mentioned above[129], has led several scholars in recent years to develop various theories advocating for the potential extension of the obligation to provide reasonable accommodations beyond disability[130].

However, in our opinion, a generalised right to reasonable accommodation beyond disability cannot be recognised in the current multilevel normative and jurisprudential framework. There seems to be a lack of strong theoretical grounding necessary to justify the legitimacy of an external "intrusion" into a contract with the imposition of costly burdens[131].

This consideration does not put an end to the «tragic choices» arising from the need to balance the multiplicity of interests and rights within work relationships. Recalling the words of Marta Cartabia, it is true that these «tragic choices cannot be always avoided, but are to be limited»[132].

In our opinion, one means of imposing such limits is the pursuit of reasonable accommodations. Echoing the words of AG Sharpston in her opinion on the *Bougnaoui* case, although a strict obligation to implement a reasonable accommodation cannot be identified, «in the vast majority of cases it [is] possible, on the basis of a sensible discussion between the employer and the employee, to reach an accommodation that reconciles adequately the competing rights of the

[129] See: § 3.

[130] The theories proposing an extension of reasonable accommodations beyond the factor of disability are numerous, and it is not possible to comprehensively analyse them in this context. For illustrative purposes, we can mention, at first, the theory which suggests that the duty to provide reasonable accommodations should be considered extended beyond disability as encompassed within indirect discrimination (see, among others: E. HOWARD, *Reasonable Accommodation of Religion and Other Discrimination Grounds in EU law*, in "European Law Review", vol. 38, no. 3/2013, pp. 360-375. See also: L. WADDINGTON, *Reasonable accommodation. Time to Extend the Duty to Accommodate Beyond Disability?*, in "Nederlands Tijdschrift voor de Mensenrechten/NJCM Bulletin", vol. 36, no. 2/2011, pp. 186-198. However, the author acknowledges that this theoretical perspective may create feasibility problems in practice). Another interesting theory associates the duty to provide reasonable accommodations under the «umbrella rationale» of Occupational Safety and Health (OSH) legislation. Scholars supporting this theory propose deriving a general obligation for reasonable accommodations from the fundamental principle of OSH legislation to adapt work to the worker (see: M. BELL, *Adapting*, cit.; A. ROSIELLO, *La sottile*, cit.). It is also worth noting the theory suggesting that a universal duty to accommodate, grounded in the duties of good faith and proportionality, should be recognized as an inseparable part of the employment relationship (see: G. DAVIDOV, G. MUNDLAK, *Accommodating All? (or: 'Ask Not What You Can Do for the Labour Market; Ask What the Labour Market Can Do for You')*, in "Bulletin of Comparative Labour Relations", 2016, vol. 93, pp. 191-208).

Finally, we must mention the theory supporting an extension of reasonable accommodations beyond disability through a shift from an «individual accommodation» model to a model of «institutional transformation» (see: C. SHEPPARD, *Individual Accommodation Versus Institutional Transformation: Two Paradigms for Reconciling Paid Work and Family Responsibilities*, in "Les 15 ans du Tribunal des droits de la personne et les 30 ans de la Charte des droits et libertés de la personne", Cowansville, Yvon Blais, 2005, pp. 379-406).

[131] See: S. D'ASCOLA, *Il ragionevole*, cit., p. 186.

[132] See: M. CARTABIA, *The Many and the Few: Clash of Values or Reasonable Accommodation?*, in "American University International Law Review", 2018, vol. 33, no. 4, p. 679.

employee to manifest his or her religion and the employer to conduct his business»[133].

Therefore, setting aside the theoretical foundation of extending the obligation of reasonable accommodations beyond disability, we would like to provide some suggestions on how reasonable accommodations could be implemented in practice.

However, finding reasonable accommodations in concrete terms is not easy. At least three sets of problems can be identified: (i) the cost (both on an economic and organisational level) not necessarily sustainable for businesses, especially for SMEs; (ii) the difficulty of finding a fair balance between the interests of the employee, the employer and other workers; (iii) the indeterminacy, that is the difficulty for the employer to know *ex-ante* the measures to be taken in practice.

To address these problems, our proposal is to intervene on the internal organisation of the company through the proceduralisation of the request (and implementation) of reasonable accommodations[134]. Accordingly, as stated in the doctrine, accommodations allow us to «[shift] the focus from the characteristics of the individual [...] to the conditions which create obstacles»[135]. At least starting a reflection on the way in which the context could be modified. «Not only people need to adapt to their environment. The ideal of equality demands that the environment itself, as far as this is possible, be changed in ways that allow everyone to participate fully in society»[136].

To proceduralise the request of reasonable accommodations within the internal organisation of the company, a crucial means is that of the so-called organisational models. These are models to which companies can voluntarily conform their internal organisation, implementing a system for managing their internal processes and procedures that aligns with the model.

The development of a comprehensive organisational model for managing requests for reasonable accommodations would require a dedicated study that is not feasible to undertake here. Therefore, we will merely point out some of the essential elements that should characterise such a model, drawing from the observation of other organisational models, including, especially, the Italian experience of the organisational models for health and safety ("*modelli di organizzazione e gestione della salute e sicurezza sul lavoro*")[137].

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[133] See: Case C-188/15, *Bougnaoui*, cit., opinion AG Sharpstone, para. 133.

[134] The centrality of the organisation of the enterprise in recognising reasonable accommodations becomes evident in the recent judgment of the Court of Milan, labour section, 17.07.2023, in "Italian Equality Network", 16.11.2023, with a comment by RIZZI.

[135] E. BRIBOSIA, J. RINGELHEIM, I. RORIVE, *Reasonable Accommodations for Religious Minorities: A Promising Concept for European Antidiscrimination Law?*, in "Maastricht Journal of European and Comparative Law", 2010, vol. 17, no. 2, p. 159. Note that this perspective is similar to that adopted in the field of workers' health and safety under the aforementioned Article 6, paragraph 2, letter (d) of Directive 89/391/EEC.

[136] *Ibid.*

[137] The regulatory references are: Article 6 of Legislative Decree no. 231/2001 and Article 30 of Legislative Decree no. 81/2008. For a more detailed analysis, see, among others: P. PASCUCCI,

First and foremost, the model should provide for an obligation to handle and respond to incoming requests of reasonable accommodations[138]. To this end, especially for larger enterprises, a specific entity or body responsible for managing the requests could be identified[139]. Furthermore, the model could envisage the involvement of external experts within the procedures for handling requests, aiming to assist the employer (or the entity responsible for the procedure) as well as worker representatives and/or trade unions.

The involvement of trade unions and union representatives is an essential element in both the drafting and the implementation of the accommodations. Regarding this second aspect, their role may not only be to support the worker in the accommodation request but also to highlight the potentially conflicting interests of other workers[140].

Furthermore, the model should provide for the implementation of an adequate verification system for its appropriateness and updating. Accordingly, one of the distinctive features that significantly influences the effectiveness of such a tool is the constant monitoring and updating of the models adopted by companies[141].

As previously mentioned, the adoption of such models can only be envisaged as voluntary. However, the legislator could introduce incentives, including, especially, bonus scores for companies adopting such models in the context of public procurement or public funding[142].

On the one hand, the hypothesis under consideration presents certain possible weaknesses.

Firstly, not all the companies may bear the costs resulting from the adoption of such a model. Moreover, if incentives are provided for participation in public procurement, SMEs may be disadvantaged, given that they could structurally encounter more difficulties in implementing the models. This contradicts European procurement regulations, which aim to ensure the broadest possible participation within public procurement, especially of SMEs.

Secondly, the adoption of organisational models by the company cannot be mandatorily imposed and can remain only a voluntary measure.

Salute e sicurezza sul lavoro, responsabilità degli enti, modelli organizzativi e gestionali, in "Rivista Giuridica del Lavoro e della Sicurezza Sociale", no. 4/2021, pp. 537-551.

[138] For such a requirement, see Article 9 of Directive no. 2019/1158/EU, on the internal corporate wrongdoing (so-called *whistleblowing*) reporting channels.

[139] This requirement may not be easily affordable for SMEs. However, as provided for the whistleblowing management systems in Article 8, para. 5 of Directive 2019/1937/EU, such companies could outsource the activity of handling accommodation requests to an entity outside their organisation, even jointly with other SMEs.

[140] Similarly, see: M. BELL, *Adapting*, cit., p. 139.

[141] See: P. PASCUCCI, *Salute*, cit., pp. 545-546.

[142] See, for instance, the bonus scores provided for in the Italian regulations on public procurement in favour of companies that certify their corporate gender equality management systems (Article 106, para. 8, and Article 108, para. 7 of Legislative Decree no. 36/2023). For a more detailed analysis on the gender equality management system, see: F. LAMBERTI, *I Key Performance Indicators della certificazione della parità di genere. Una lettura critica*, in "Federalismi.it", no. 9/2023, pp. 212-241.

Thirdly, it is worth noting that proceduralising the request for reasonable accommodation does not necessarily mean that the interests of the worker or the finding of a middle-ground solution will actually be guaranteed.

On the other hand, there are multiple strengths.

Firstly, the proceduralisation of accommodation requests, extending beyond disabilities, enables the employer to adopt an *ex-ante* perspective. Unlike the case-by-case approach which needs an *ex-post* intervention, the adoption of the organisational model leads the company to proactively assess possible accommodation requests and to establish a dedicated management procedure. In this regard, the organisational model becomes almost a preventive measure against possible negative effects arising from «tragic choices»[143].

Secondly, while the proceduralisation of reasonable accommodations does not guarantee the interest of the requesting worker, it does not exclude the scrutiny of discriminatory acts by employers. The proceduralisation can be seen as an "additional" element compared to antidiscrimination regulations.

Thirdly, as mentioned above, the organisational model could promote and strengthen the involvement of trade unions and worker representatives in corporate decisions that promise to impact the rights and interests of the workforce[144].

Finally, the adoption of a suitable organisational model can bring advantages also to employers. At first, several incentives are usually provided for the companies who implement such models. Additionally, reasonable accommodations are characterised by a certain degree of uncertainty for the employers. Accordingly, the employer may not be able to provide sufficient evidence of the adequacy of the accommodation adopted in practice. Through the proceduralisation of requests, employers may find it easier to provide such evidence, as the model consists of procedures aimed at ensuring the adoption of appropriate solutions that respect the interests of all parties involved.

It has been mentioned that one of the fundamental issues regarding the extension of reasonable accommodations beyond disability is the economic sustainability and feasibility of requests in practical terms. Therefore, if proceduralisation of reasonable accommodations produces positive effects for both employers and employees, it could serve as the catalyst for a more radical evolution of the system. This evolution, starting from a practical instrument of voluntary soft law, could lead to a regulatory change, extending the obligation of

reasonable accommodations beyond disability[145].

[143] On the "preventive value" of organisational models, see: P. PASCUCCI, *Salute*, cit.

[144] On the importance of such aspects, see: L. ZOPPOLI, *Il controllo collettivo sull'efficace attuazione del modello organizzativo per la sicurezza nei luoghi di lavoro*, in D. FONDAROLI, C. ZOLI (eds.), *Modelli organizzativi ai sensi del d.lgs. n. 231/2001 e tutela della salute e della sicurezza nei luoghi di lavoro*, Turin, Giappichelli, 2014, pp. 12-26.

[145] This would not be an isolated or utopian perspective, given that, in addition to the many clues that have emerged in this study, other legal systems - USA and Canada, above all - already provided for obligations of reasonable accommodation in relation to factors of possible

In light of the above, it seems reasonable to consider that the implementation of organisational models aimed at proceduralising requests for reasonable accommodations beyond disability could contribute to the creation of a work environment more attentive to the needs and demands of all workers. Moreover, this would not stem from adopting an individualistic perspective, but rather by consistently maintaining a perspective focused on the overall well-being of the entire workforce. This approach allows for bridging the gap between reasonable accommodations and the concept of "health" as broadly defined by the World Health Organization (WHO): «a state of complete physical, mental, and social well-being, and not merely the absence of disease or infirmity»[146]. If the employer must «adapt work to the individual»[147], then the perspective adopted in this research does not appear to be merely desirable but rather a necessity for a truly democratic, pluralistic society which aspires to protect every need and diversity.

Abstract

In questo contributo gli Autori intendono verificare se sia possibile prefigurare un'estensione dell'obbligo di accomodamenti ragionevoli, gravante sul datore di lavoro (privato), oltre il fattore della disabilità. L'analisi, condotta attraverso una comparazione verticale tra gli ordinamenti italiano, polacco e turco, è sviluppata ponendo in luce alcune misure di "adeguamento" che vengono già riconosciute in favore delle lavoratrici e dei lavoratori per la tutela di altri due fattori di possibile discriminazione, la religione e le responsabilità di cura familiari. La conclusione è che, attualmente, non pare potersi configurare un tale obbligo in via generale e astratta. D'altra parte, si coglierà l'occasione per prospettare una possibile soluzione pratica alle difficoltà di bilanciamento tra i molteplici interessi coinvolti che si pongono a fronte della concreta attuazione di tali forme di "accomodamento". In particolare, l'idea proposta è quella di procedimentalizzare le richieste di accomodamento ragionevole (anche oltre il fattore della disabilità) valorizzando l'esperienza dei modelli organizzativi di gestione dei processi aziendali, già sperimentata in altri contesti.

In this contribution, the Authors aim to examine whether it is possible to envision an extension of the obligation of reasonable accommodation, imposed on private employers, beyond the factor of disability. The analysis, conducted through a vertical comparison of the Italian, Polish, and Turkish legal systems, is carried out by highlighting some measures of "adjustment" that are already recognised to protect workers against two other factors of potential discrimination: religion and family care responsibilities. The conclusion is that, currently, such an obligation does not appear to be conceivable. However, this research provides an opportunity to propose a practical solution to the challenges of balancing the multiple interests involved in the concrete implementation of such forms of "accommodation". Specifically, the suggested idea is to formalise requests for reasonable accommodation (even beyond disability) by leveraging the experience of organisational models for managing business processes, which have already been tested in other contexts.

Parole chiave

Discriminazione, Parità di trattamento, Accomodamenti ragionevoli, Religione, Responsabilità familiari, Caregivers

Keywords

Discrimination, Equality, Reasonable accommodation, Religion, Family responsibilities, Caregivers

discrimination other than disability. Scholars' analyses of the American and Canadian systems are manifold. See, among others: E. BRIBOSIA, J. RINGELHEIM, I. RORIVE, *Reasonable*, cit., pp. 139-150.

[146] The Constitution of the World Health Organization.

[147] As expressed in the repeatedly cited Article 6, para. 2, lett. (d) of Directive 89/391/EEC.